Supreme Court, U.S.
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No. 94-

In The

Supreme Court of the United States

October Term, 1994

HYUNDAI MOTOR COMPANY, HYUNDAI MOTOR AMERICA and CENTRAL HYUNDAI COMPANY,

Petitioners,

v.

EVELYN PHILLIP, as Personal Representative of the Estate of Ann Marie Phillip, deceased,

Respondent.

Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, Third District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), make the Supremacy Clause powerless to preempt state law that directly conflicts with federal law, whenever a federal act has preemption language that does not expressly speak to the conflict at hand?

PARTIES IN THE COURT OF APPEALS

All parties in the court below are identified in the caption of this petition.[1]

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[1] Pursuant to rule 29.1, Hyundai Motor Company, Hyundai Motor America, and Central Hyundai (collectively "Hyundai") state as follows: Hyundai Motor Company has no parent. It is the parent of Hyundai Motor America, and also has the following subsidiaries that are not wholly owned: Hyundai Auto Canada Inc. and KEFICO. Hyundai Motor America and Central Hyundai have no subsidiaries that are not wholly owned.

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OPINIONS BELOW

The decision of the District Court of Appeal of Florida, Third District, affirming the judgment in this case and finding no preemption, is reported at 639 So. 2d 1064 and is reproduced as Appendix A. The Court of Appeal's decision denying Hyundai's Petition for Rehearing is reproduced as Appendix B.

JURISDICTION

The District Court of Appeal of Florida, Third District, entered its order affirming judgment for plaintiffs on July 12, 1994. (App. A-1) It denied a timely Petition for Rehearing on August 16, 1994. (App. B-1) The District Court of Appeal of Florida, Third District, is the highest court of the state in which decision could be had because the Florida Supreme Court has no jurisdiction over the case.[2] Accordingly, this Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1257(a).

[2] Indeed, in opposing a stay of execution pending Hyundai's efforts to seek review in the Florida Supreme Court or in this Court, plaintiff stated that "[t]he required basis for Florida Supreme Court jurisdiction does not exist. *See* Fla.R.App.P. 9.030(a)(2)." *See* Appellee's Response to Hyundai's Motion to Stay Mandate, at 3.

STATUTORY PROVISIONS INVOLVED

This case concerns the Supremacy Clause, and the preemptive effect of the National Traffic and Motor Vehicle Safety Act, 42 U.S.C. § 30101 *et seq.* (and as formerly codified at 15 U.S.C. § 1381 *et seq.*) (the "Safety Act"), and a regulation promulgated under it, Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208.

The Supremacy Clause provides that federal law is "the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl.2.

The Safety Act's preemption clause, as codified at 15 U.S.C § 1392(d), entitled "supremacy of federal standards," provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if

> such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.[3]

The Safety Act's clause entitled "[c]ontinuation of common law liability," 15 U.S.C. § 1397(k) also (now recodified at 49 U.S.C. § 30103(e)), provides:

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

The regulation at issue here, Federal Motor Vehicle Safety Standard 208 ("FMVSS 208") is lengthy. It appears at 49 C.F.R. § 571.208, and its pertinent text is set out at App. C.

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[3] This was the language in force when the Hyundai at issue here was manufactured, when the claims were made, and when the preemption issue was briefed and argued. The Safety Act recently was recodified so all "laws related to transportation [appear] in one comprehensive title," and moved from Title 15 to Title 49 of the United States Code. H.R. Rep. No. 103-180, 103d Cong., 2d Sess. 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 820. In the course of recodification, there were some "technical improvements" to language to promote "clarity" and "consistency" and avoid "surplusage." *Id.*; 49 U.S.C.A. § 30103, Historical and Statutory Notes. "[P]recautions [were] taken against making substantive changes in the law." H.R. Rep. No. 103-108, 103d Cong., 2d Sess. 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 820. The preemption case law discusses the provisions as codified before. To avoid confusion, this brief does also.

STATEMENT OF THE CASE

In 1966, Congress enacted the Safety Act. The Act directs the Department of Transportation and its subdivision, the National Highway Traffic Safety Administration ("NHTSA"), to issue federal motor vehicle safety standards that are "practicable," "meet the need for motor vehicle safety," and apply throughout the country. 15 U.S.C. § 1392(a) (now codified at 49 U.S.C. § 30111). The "task called for considerable expertise." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33 (1983).

Congress enacted, as part of the Safety Act, an express preemption clause, and denominated it "Supremacy of Federal standards." Congress provided that "[w]henever" the Department establishes a federal standard, "no State or political subdivision of a State shall have *any* authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d) (emphasis added). Congress also stated, in a section denominated "continuation of common law liability," that compliance with a federal standard "does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). However, that general "savings clause" is not denominated a preemption clause; structurally is not a part of the preemption clause; and says nothing on its face about preemption, much less purports to preclude preemption of claims based on a non-identical common-law standard that

directly conflicts with a federal standard. *See* pp. 15-20, below.

In response to the Safety Act's mandate, the Department of Transportation adopted Federal Motor Vehicle Safety Standard 208 ("FMVSS 208"). It addressed restraint systems, and expressly granted (and still grants) automobile manufacturers choices among restraint system options. In particular, FMVSS 208 expressly granted to manufacturers the option to install a 2-point automatic seat belt system "in place of" a 3-point belt system. 49 C.F.R. § 571.208, S4.1.2-S4.1.4, S4.5.3 (1971-94). Indeed, one after another Secretary of Transportation lauded the 2-point belt system, and reaffirmed that option. 39 Fed. Reg. 3834 (1974) (Secretary Brinegar); 41 Fed. Reg. 24070, 24070 n.2, 24072 (1976) (Secretary Coleman); 42 Fed. Reg. 34295 (1977) (Secretary Adams); 49 Fed. Reg. 28962, 28984, 28999 (1984) (Secretary Dole). Secretary Dole, the Secretary of Transportation who adopted the version of FMVSS 208 at issue here, held that options, prominently including the 2-point belt option, were the best way to meet the safety goal, and that mandating any single type of passive restraint "runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems." 49 Fed. Reg. at 29001 (1984) (emphasis added).

Ann Marie Phillip was killed in a severe car accident when driving a 1988 Hyundai Excel. Plaintiff sued Hyundai, on the theory that the Hyundai was defective because it was equipped with that 2-point belt system, and not the 3-point belt system plaintiff preferred, even though FMVSS 208 expressly granted Hyundai the option to install the 2-point system "in place of" the 3-point system. (A. 24-25; R. Tr. 1512) Hyundai sought summary

judgment against plaintiff's theory, on the ground that it was preempted by federal law.[4] The trial court denied the

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[4] A wealth of authority supported, and supports, Hyundai's motion. *See, e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 787 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. Ct. App. Div. 1994); *Boyle v. Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App. 1993), *rev. denied*, 510 N.W.2d 137 (1993); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. 1993); *Nissan Motor Corp. v. Superior Court (Meier)*, 212 Cal. App. 3d 980 (Cal. Ct. App. 1989), *cert. denied*, 494 U.S. 1066 (1990); *Gardner v. Honda Motor Co.*, 536 N.Y.S. 2d 303 (N.Y. App. Div. 1988); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), *cert. denied*, 487 U.S. 1236 (1988); *Montag v. Honda Motor Co., Ltd.*, 856 F. Supp. 574 (D. Colo., 1994); *Tammen v. General Motors Corp.*, 857 F. Supp. 788 (D. Kan. 1994); *Gills v. Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993); *Heath v. General Motors Corp.*, 756 F. Supp. 1144 (S.D. Ind. 1991); *Kelly v. General Motors Corp.*, 705 F. Supp. 303 (W.D. La. 1988); *Dallas v. General Motors Corp.*, 725 F. Supp. 902 (W.D. Tex. 1989); *Surles v. Ford Motor Co.*, 709 F. Supp. 732 (N.D. Tex. 1988); *Kolbeck v. General Motors Corp.*, 702 F. Supp. 532 (E.D. Pa. 1988); *Staggs v. Chrysler Corp.*, 678 F. Supp. 270 (N.D. Ga. 1987); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987); *Wattelet v. Toyota Motor Corp.*, 676 F. Supp. 1039 (D. Mont. 1987); *Schick v. Chrysler Corp.*, 675 F. Supp. 1183 (D.S.D. 1987); *Baird v. General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio 1986); *Cox v. Baltimore County*, 646 F. Supp. 761 (D. Md. 1986); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986); *Cerniak v. Nissan Motor Corp.*, 1991 WL 147366 (N.D. Ill. 1991); *Pak v. Chrysler Motors Corp.*, 1990 WL 193821 (E.D. Pa. 1990), *aff'd*, 941 F.2d 1200 (3d Cir. 1991); *Heftel v. General Motors Corp.*, 1988 WL 19615 (D.D.C. Feb. 23, 1988); *Bass v. General Motors Corp.*, 1987 WL 54449 (W.D. Tex. 1987); *Vasquez v. General Motors Corp.*, 1986 WL 18670-71 (D. Ariz. 1986).

motion, and the matter was tried to a jury. Despite the testimony of the coroner who performed the autopsy (not a hired expert) that the accident forces, not the belts, caused Ms. Phillip's death (R. Tr. 975-79; 1005-11; 1014-15), the jury returned a $2.4 million verdict for plaintiff.

On appeal, plaintiff argued that her claim was permitted, despite its direct conflict with FMVSS 208, based on the Eleventh Circuit's decision in *Myrick v. Freuhauf, Inc.*, 16 F.3d 1516 (11th Cir. 1993), *reh'g. denied*, 24 F.3d 526 (11th Cir.), *cert. granted*, 1994 U.S. LEXIS 7039 (Oct. 7, 1994). The appellate court accepted that argument, ruling that "based on the authority of *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994) . . . we find that the National Traffic and Motor Vehicle Safety Act does not preempt the plaintiff's common law tort claims against Hyundai."[5] (App. A-3) This Court has now granted review of the *Myrick* decision. *Freightliner v. Myrick*, 1994 U.S. Lexis. 7039 (Oct. 7, 1994).

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[5] The majority also cited as support two cases that found preemption (*Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), and *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990)), and an off-point case that found no preemption where the claim did not seek to take away an expressly granted FMVSS 208 option (*Perry v. Mercedes Benz of N. Am., Inc.*, 957 F.2d 1257 (5th Cir. 1992)). (App. A-3)

REASONS FOR GRANTING THE WRIT

I. SUMMARY OF ARGUMENT

In *Myrick*, a sharply divided panel of the Eleventh Circuit acknowledged its earlier holding in *Taylor* that the Safety Act's preemption clause was " 'too ambiguous to manifest a congressional intent' " expressly to preempt a no-airbag claim, that the so-called savings clause did not clearly preserve the claim, and that the clauses were in "conflict." 13 F.3d at 1526 (quoting *Taylor*, 875 F.2d at 825 n. 18). Nevertheless, the *Myrick* majority read those two admittedly ambiguous and conflicting clauses to provide a "reliable indicium" of Congress' intent not to preempt any common law claim. The court concluded that the Supremacy Clause accordingly is powerless to preempt a common-law claim based on a standard that flatly conflicts with the Safety Act or an applicable FMVSS, or even to preempt a common law claim that makes it impossible to comply with the Safety Act or an FMVSS. The Florida court followed *Myrick*. (App. A-3)

This Court has now granted review of the *Myrick* decision, and *Myrick* is indeed at odds with settled law that is as old as the republic. For *Myrick* ignores a century or more of Supreme Court precedent holding that conflicting state law falls by "direct operation of the Supremacy Clause," and that even where a savings clause shows Congress' intent ***not*** to preempt, state law that directly conflicts with federal law is implicitly preempted.

If *Myrick* falls, so must this case; the decision below is based on *Myrick*. But even if *Myrick* stands, this case must fall. All three branches of government agree. Over 120 courts, including every circuit to address the issue, hold

with unprecedented unanimity that FMVSS 208 is, in the language of the case law, "unique," and preempts even if other FMVSSs do not. The Solicitor General, stating the views of the Department of Transportation and NHTSA, has already told the Court that allowing common-law claims that take away FMVSS 208 options would "obviously eliminate the diversity that the secretary found necessary," would "*disserve* the *safety* purposes of the Act," and so would "stand as an obstacle" to the agency's objectives, in fact "drastically" interfere with them. Brief for the United States as Amicus Curiae, *Wood v. General Motors Corp.*, No. 89-46 (S.Ct., filed March 1990), at 14, 15 (original emphasis). And Congress has stated its intent not to "alter, change or modify in any way" the case law finding preempted claims that conflict with FMVSS 208.

FMVSS 208's preemptive effect is critical to the automotive industry. For claims that take away federally granted FMVSS 208 options, if allowed, would turn every car accident on the road into a potential tort case, and a referendum on the policy embodied in FMVSS 208. For every car is equipped with a restraint system authorized by FMVSS 208. Every person injured in every accident could claim that a different FMVSS 208 option should have been chosen in their car, and seek to punish the manufacturer for choosing an option federal law found essential to meeting the safety goal. That destruction of federal goals should not be permitted, especially as an unintended consequence of the Court's decision in *Myrick*.

The Court should grant certiorari here. In the alternative, we ask that the Court hold the petition pending the decision in *Myrick*.

II. THE PREEMPTION DECISION IN THIS CASE IS BASED ON *MYRICK*, AND CERTIORARI SHOULD BE GRANTED FOR ALL THE REASONS IT WAS GRANTED IN *MYRICK*.

A. In Foreclosing Implied Preemption Analysis, *Myrick* Misreads This Court's Cases, And Violates Settled Preemption Principles Laid Down In Them.

In *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1993), this Court held that where an Act's preemption clause provides "a 'reliable indicium of congressional intent with respect to state authority,' " and where "other provisions" of the Act "offer no cause to look beyond" the preemption clause, there is no "need" to look beyond it. 112 S. Ct. at 2618. The *Myrick* majority interpreted that language to add a "new wrinkle to the fabric of pre-emption law," and a "clear instruction that when there is an express pre-emption provision we should not consider implied pre-emption," even in the face of a direct conflict between state and federal law, or even when a state-law rule makes compliance with federal law impossible. 13 F.3d at 1521-22.

In fact, the language from which the *Myrick* majority inferred that "new wrinkle" is not new at all. That language is at least 14 years old. *See e.g., California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282 (1987) ("[T]here is no need to infer congressional intent to pre-empt state laws from the substantive provisions of Title VII; these two [preemption] sections provide a 'reliable indicium of congressional intent with respect to state authority' to regulate employment practice") (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978). It

never before was imagined to preclude conflict preemption analysis, much less mandate that state law prevails and federal law falls (the opposite of what the Supremacy Clause commands) when state law directly conflicts with federal law.[6]

The Supremacy Clause provides that federal law is the "supreme law of the land." Therefore, a state law that

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[6] *Myrick* also cited, as support for its rule foreclosing conflict preemption, *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732 (1993). *CSX* considered whether state tort claims regarding a warning device at a railroad crossing were preempted by the Federal Railroad Safety Act (FRSA). The FRSA has an express preemption clause that bars any state law requirement that relates to railroad safety when there is a federal "rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. The Court stated that an express preemption clause is *not* dispositive: "If the statute contains an express pre-emption clause, the task of statutory constriction must *in the first instance* focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." 113 S. Ct. at 1737 (emphasis added). The Court looked at the federal regulations at issue, judged that they did not cover the same subject matter as the tort claims, and so held that those claims were not expressly preempted. 113 S. Ct. at 1742. The Court then "reject[ed] petitioner's claim of implied 'conflict' preemption, * * * on the basis of the preceding analysis." 113 S. Ct. at 1742 n.12.

The *Myrick* majority read that to mean a "separate implied pre-emption analysis" was precluded because the statute contains an express preemption clause. 13 F.3d at 1524. But we submit that Judge Hill, in dissent, read *CSX* correctly: the Court simply found that federal law did not "cover" the same subject as the state common law in issue, and accordingly "did not conduct an implied conflict pre-emption analysis because . . . it found no conflict" between state and federal law. *See* 13 F.3d at 1530 (Hill, J., dissenting).

conflicts with federal law "is pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant Employees and Bartenders Int'l. Union*, 468 U.S. 491, 501 (1984). Indeed, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962). That basic rule is as old as the Republic, and *Cipollone* certainly did not change it, much less with a passing sentence that echoed settled law.

Indeed, the Court's own analysis – just before and then after *Cipollone* – confirms that the basic rule is still the law. Just a week before *Cipollone*, this Court found that a state law "in conflict" with federal law was implicitly preempted despite an express preemption clause, and, quoting *Free v. Bland*, reaffirmed that basic rule. *Gade v. National Solid Waste Management Ass'n*, 112 S. Ct. 2374, 2388 (1992).[7] Just last term, this Court "discern[ed] no solid basis for believing that Congress," when it included both a preemption clause and a savings clause in an Act, "intended fundamentally to alter traditional preemption analysis." *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993). Thus, it held that the saved state law "generally is not displaced, but 'where [it] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal

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[7] *Gade* also observed that "our pre-emption categories are not 'rigidly distinct.' " 112 S. Ct. at 2386, n.2. *Myrick* comments that *Gade* was decided by a plurality. 13 F.3d at 1523. But 3 of the 4 members of that plurality (Chief Justice Rehnquist, and Justices White and O'Connor) were also members of the *Cipollone* plurality whose language *Myrick* relied on.

preemption occurs." *Id.* (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

In a long line of preemption decisions, this Court has considered – and, indeed, adopted – implied preemption arguments regarding statutes with express preemption clauses. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139-42 (1990) (ERISA); *Northwest Cent. Pipeline Corp. v. Kansas Corp. Comm'n*, 489 U.S. 493, 509-22 (1989) (Natural Gas Act); *Jones v. Rath Packing Co.*, 430 U.S. 519, 538-43 (Fair Packing and Labeling Act), *reh'g. denied*, 431 U.S. 925 (1977).[8] In fact, over a century of case law makes clear that, even where an act has a common law savings clause and no preemption clause at all, the Supremacy Clause preempts state common law that directly conflicts with federal law. Thus in *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), the Supreme Court held preempted an existing but conflicting common-law claim in the face of a savings clause, because a savings clause "cannot in reason be construed as continuing . . . a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act." *See also International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94, 493 n.13 (1987) (savings clause provided "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law;" Senate Report said "[c]ompliance with . . . Act

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[8] As Justice Souter observed last Term, "whether or not Congress has used any special 'preemptive' language, state regulation must yield to the extent it actually conflicts with federal law." *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1776 (Souter, J., dissenting, joined by Blackmun, Stevens, and Ginsburg, JJ.), *reh'g. denied*, 114 S. Ct. 2771 (1994).

would not be a defense to a common law action for . . . damages," conflicting common law claims preempted; Congress could not have "intended to undermine . . . [the Act] through a general savings clause"). *Accord Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 210-11 (1986); *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 671 n.22 (1963); *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 473-74 (1959); *Pennsylvania v. Nelson*, 350 U.S. 497, 501 n.10 (1956), *reh'g denied*, 351 U.S. 934 (1956); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1086 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980).

Myrick proposed that *Cipollone* changed all that law, without mentioning it, and with this startling consequence: (1) A state law that "interferes with and frustrates" federal law – in other words, flatly conflicts with it – is impliedly preempted absent any preemption clause in the federal statute the state law flatly conflicts with. But (2) that state law is not impliedly preempted if the federal statute the state law conflicts with contains a preemption clause and that clause does not expressly preempt the state law. So (3) a federal statute has greater preemptive force as to a conflicting state law if it does not have a preemption clause than if it does. In fact, (4) according to *Myrick*, "when there is an express pre-emption provision we should not consider implied pre-emption" at all, even though a state law flatly conflicts with federal law, and indeed even when it is absolutely "impossible" to comply with federal law if one complies with the state law, and vice versa. 13 F.3d at 1519, 1522.

Cipollone did not hold that when Congress enacts a preemption clause, it gives the Act less preemptive force,

not more, than the Act would have without the clause. And *Cipollone* did not overrule a century of authority, and the settled principles that authority lays down, without mentioning it.

The Eleventh Circuit's decision was thus a radical departure from this Court's settled precedents, and other lower courts' understandings of them. *See, e.g., Jackson v. Culinary School of Washington, Ltd.*, 27 F.3d 573, 581 n.12 (1994) (court does "not read *Cipollone* to stand for the proposition that the enumeration of preempted areas in a statute forecloses altogether the possibility that state statutes in actual conflict can be preempted. . . . Where a state statute actually frustrates the purposes of Congress, we do not believe that the specific preemption clauses in a statute alone provide a 'reliable indicium of congressional intent with respect to state authority' ") (quoting *Cipollone*, 112 S. Ct. at 2618); *Gills*, 829 F. Supp. at 897 (*Cipollone* "broke no new ground").

B. In Rejecting Express Preemption, *Myrick* Reads The Safety Act's Preemption Language In Contravention Of *Cipollone* And In Direct Conflict With The Readings Given Similar Language By Other Courts.

The *Myrick* majority rejected express preemption, based on its pre-*Cipollone* holding in *Taylor* that common law claims did not fall within the Safety Act's express preemption provision because Congress failed to " 'make explicit reference to state common law in the Act's preemption clause.' " 13 F.3d at 1520 (citing *Taylor*, 875 F.2d at 824). But that rationale was repudiated by *Cipollone*,

which held that the express preemption provision at issue in that case included common law duties even though it spoke only of " 'requirement[s] or prohibition[s] * * * imposed under State law.' " 112 S. Ct. at 2619-21. The Court reasoned that since state " 'regulation can be as effectively exerted through an award of damages as through some form of preventive relief,' " the preemption clause encompassed common-law actions, even though the clause did not expressly mention common law. *Id.* That reasoning applies here, squarely.

Indeed, since this Court's decision in *Cipollone*, seven circuits have addressed the issue of federal preemption under analogous statutes and concluded that preemption of state law "requirements" or "standards" necessarily meant that Congress intended expressly to preempt common law claims.[9] Following *Cipollone*, the overwhelming majority of courts across the country have found express preemption based on preemption clauses that do not mention common law, under numerous federal health

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[9] *See Gile v. Optical Radiation Corp.*, 22 F.3d 540, 542 (3rd Cir. 1994); *Worm v. American Cynamid Co.*, 5 F.3d 744, 748-49 (4th Cir. 1993); *King v. E.I. Du Pont de Nemours & Co.*, 996 F.2d 1346, 1349 (lst Cir.), *cert. dismissed*, 114 S. Ct. 490 (1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir.), *reh'g. denied*, 1993 U.S. LEXIS 17385 (7th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516, 517 (11th Cir.), *cert. denied*, 114 S. Ct. 300 (1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir.), *cert. denied*, 114 S. Ct. 60 (1993); *Stamps v. Collagen*, 984 F.2d 1416, 1424 (5th Cir.), *cert. denied*, 114 S. Ct. 86 (1993).

and safety statutes, including the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136, *et seq.*,[10] the Federal Hazardous Substances Act, 15 U.S.C. § 1261, *et seq.*,[11] the Medical Device Amendments of 1976 to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 360c, *et seq.*,[12]

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[10] *See, e.g., MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1024 (5th Cir. 1994); *Bingham v. Terminix Int'l Co.*, 850 F. Supp. 516, 520 (S.D. Miss. 1994); *Allen v. Pennco Engineering Co.*, 847 F. Supp. 1315, 1319 (M.D. La. 1994); *Trinity Mountain Seed Co. v. MSD Agvet, Div. of Merck & Co.*, 844 F. Supp. 597, 601 (D. Idaho 1994); *Quad R Farms v. American Cyanamid Co.*, 840 F. Supp. 694, 696 (D. Minn. 1993); *DerGazarian v. Dow Chem. Co.*, 836 F. Supp. 1429, 1447 (W.D. Ark. 1993); *Kolich v. Sysco Corp.*, 825 F. Supp. 959, 961 (D. Kan. 1993); *Levesque v. Miles Inc.*, 816 F. Supp. 61, 69 (D.N.H. 1993); *Casper v. E.I. Du Pont de Nemours & Co.*, 806 F. Supp. 903, 907 (E.D. Wash. 1992); *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128, 1140 (E.D.N.Y. 1992); *Gibson v. Dow Chem. Co.*, 842 F. Supp. 938, 939 (E.D. Ky. 1992); *Brennan v. Dow Chem. Co.*, 613 So. 2d 131, 132 (Fla. Dist. Ct. App. 1993); *June v. Laris*, 602 N.Y.S.2d 778, 784 (N.Y. Sup. Ct. 1993); *Hopkins v. Ciba-Geigy Corp.*, 432 S.E.2d 142, 145-46 (N.C. Ct. App. 1993).

[11] *See, e.g., Moss v. Parks Corp.*, 985 F.2d 736, 740 (4th Cir.), *cert. denied*, 113 S. Ct. 2999 (1993); *DeHaan v. Whink Prods. Co.*, 1994 WL 24322, *6 (N.D. Ill. Jan. 26, 1994); *Salazar v. Whink Prods. Co.*, 1994 WL 115876, *2 (Colo. Ct. App. Apr. 7, 1994); *State ex rel. Jones Chemicals, Inc. v. Seier*, 871 S.W.2d 611, 613 (Mo. Ct. App. 1994).

[12] *See, e.g., Mendes v. Medtronic, Inc.*, 18 F.3d 13, 16 (lst Cir. 1994); *King v. Collagen Corp.*, 983 F.2d 1130, 1134-35 (lst Cir.), *cert. denied*, 114 S. Ct. 84 (1993); *Slater v. Optical Radiation Corp.*, 961 F.2d 1330, 1333 (7th Cir.), *cert. denied*, 113 S. Ct. 327 (1992); *Bravman v. Baxter Healthcare Corp.*, 842 F. Supp. 747, 755 (S.D.N.Y. 1994); *Griffin v. Medtronic, Inc.*, 840 F. Supp. 396, 397 (D. Md. 1994); *Tucker v. Collagen Corp.*, 1994 WL 87367, *3 (N.D. Ill. Mar. 16, 1994); *Michael v. Shiley, Inc.*, 1994 WL 59349, *7 (E.D. Pa. Feb. 25, 1994); *Kemp v. Pfizer, Inc.*, 835 F. Supp. 1015, 1020 n.4 (E.D. Mich. 1993); *Reiter v. Zimmer, Inc.*, 830 F. Supp. 199, 203

and the Federal Boat Safety Act, 46 U.S.C. § 4301, *et seq.*[13]

The Eleventh Circuit's rejection of express preemption in *Myrick* thus conflicts with this Court's decision in *Cipollone* and the scores of federal and state court decisions post-*Cipollone* finding express preemption in similar contexts. It also conflicts with this Court's long-standing understanding that common law standards are "standards." *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-15 (1987) (referring to state common law "safety standards"); *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("negligence standards of the common law").

In finding no express preemption, the Eleventh Circuit also relied on its prior holding in *Taylor* that the Safety Act's so-called savings clause forecloses express preemption of common law liability for it would otherwise be "a mere redundancy." 13 F.3d at 1520 (citing *Taylor*, 875 F.2d at 823-25).[14] The savings clause, however,

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(S.D.N.Y. 1993); *Cameron v. Howmedica, Div. of PfizerHosp. Prods. Group, Inc.*, 820 F. Supp. 317, 319 (E.D. Mich. 1993); *Hunsaker v. Surgidev Corp.*, 818 F. Supp. 744, 751 (M.D. Pa. 1992); *Covey v. Surgidev Corp.*, 815 F. Supp. 1089, 1094 (N.D . Ohio 1993).

[13] *See, e.g., Shield v. Bayliner Marine Corp.*, 822 F. Supp. 81, 84 (D. Conn. 1993); *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579, 1581 (M.D. Ga. 1991); *Mowery v. Mercury Marine*, 773 F. Supp. 1012, 1017 (N.D. Ohio 1991); *Farner v. Brunswick Corp.*, 607 N.E.2d 562, 567 (Ill. Ct. App. 1992), *app. denied*, 616 N.E.2d 333 (1993).

[14] The *Myrick* majority also noted that the statute in *Cipollone* lacked a savings clause 13 F.3d at 1527. That cannot be dispositive, however, because this Court found express preemption of common law claims in *CSX*, and the FRSA has a savings

serves two important functions, well grounded in Supreme Court jurisprudence: (1) it shows that Congress has not "occupied the field" of safety regulation, for savings clauses are meant "not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections – but to preserve all existing rights which were not inconsistent with those created by the statute";[15] and (2) it preserves common law actions that do not conflict with, or frustrate the purpose of, applicable federal safety standards, even if they relate to the "same aspect of performance."[16] In contrast, the function ascribed to the clause by *Myrick* – saving even claims that directly undermine the Act – is long rejected in Supreme Court jurisprudence. *See Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907); *Chicago & N.W.*

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clause. *See* 113 S. Ct. at 1736; *see also Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037-40 (1992) (finding express preemption under the Airline Deregulation Act, which has a savings clause).

[15] *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *accord Chicago & N.W. Transp. Co.*, 450 U.S. at 328 (savings clause included because without it, " 'it might have been claimed that, Congress having entered the field, the whole subject . . . had been withdrawn from the jurisdiction of the state courts' ") (quoting *Puritan*, 237 U.S. at 130).

[16] FMVSS 208 expressly grants, for safety reasons, a choice among restraint system options. The savings clause thus would preserve a common law claim that a chosen option was negligently manufactured. But it would not preserve a common law action, such as the claims here, seeking to recover damages from a defendant for exercising one option, instead of another. *See, e.g., Perry*, 957 F.2d at 1265 (distinguishing a failure-to-install claim from a claim that a chosen system was not properly designed, and holding that the latter claim is not preempted).

Transp. Co., 450 U.S. at 328-31; *Offshore Logistics, Inc.*, 477 U.S. at 210-11; *Arrow Transp. Co.*, 372 U.S. at 671 n.22; *T.I.M.E. Inc.*, 359 U.S. at 473-74; *Nelson*, 350 U.S. at 501 n.10; *Gulf Oil Corp.*, 601 F.2d at 1086. *See also Morales*, 112 S. Ct. at 2037 ("general 'remedies' savings clause cannot be allowed to supersede the specific substantive pre-emption provision"); *John Hancock*, 114 S. Ct. at 526 (saved state law "generally is not displaced, but 'where [it] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal preemption occurs") (citing *Silkwood*, 464 U.S. at 248). Indeed, if *Myrick* were right that the existence of a preemption clause forecloses preemption of anything not covered by the clause, the savings clause would serve no purpose at all.

Even if *Myrick* were right that the existence of a savings clause and preemption clause means there is no express preemption, at a minimum, *Cipollone* adds force to the Safety Act's preemption clause. Even before *Cipollone*, all four circuits to address the question concluded that the savings clause, § 1397(k), shows that § 1392(d) is not a "reliable indicium" of Congress' preemptive intent on the matter at hand, and so "offers cause to look beyond" § 1392(d). As the First Circuit summed it up, the "Safety Act is thus ambiguous as to . . . whether a state product liability claim . . . which seeks to hold an automotive manufacturer liable for failing to adopt a standard 'not identical' to a federal safety standard covering the 'same aspect of performance' . . . is *preserved* by section 1397(c) [or] preempted by § 1392(d)." *Wood*, 865 F.2d at 398

(emphasis in original).[17] The savings clause is stronger after *Cipollone*, and so sharpens the conflict that the courts already had found between the preemption clause and the savings clause. Consequently it underlines the ambiguity of each, and accordingly, far from foreclosing implied preemption analysis, compels it. Again, other cases have so held; *Myrick* stands in stark contrast. *See, e.g., Boyle*, 501 N.W.2d at 871 ("Because the explicit preemption clause and the savings clause appear to conflict, neither clause 'provides a reliable indicium of congressional intent with respect to state authority.' The existence of two clauses dealing with preemption that appear to conflict compels us to look beyond the express preemption provision.") (quoting *Cipollone*); *Marrs*, 852 S.W.2d at 575-76; *Gills*, 829 F. Supp. at 899.[18]

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[17] *Accord Taylor*, 875 F.2d at 825 (finding "conflict between the language of the Safety Act's preemption and savings clauses" and "conclud[ing] that the Safety Act cannot be construed as unambiguously manifesting an intention to preempt appellants' common law claims."); *Pokorny*, 902 F.2d at 1121; *Kitts*, 875 F.2d at 789 (following *Wood*); *Heath*, 756 F. Supp. at 1147 (the "savings clause, when considered in combination with the preemption clause, makes ambiguous Congress' intent with respect to preemption of state common law claims").

[18] The implied preemption analysis is also compelled by the regulation itself, even apart from the conflicting statements of Congress. "Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). "A pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Fidelity Federal Savings*, 458 U.S. at 154. The proper inquiry is "whether the federal agency has properly exercised its own delegated authority." *City of New York v. Federal Communications Commission*, 486 U.S. 57, 64 (1988). Thus, "[s]o long as an agency has statutory authority to issue

In sum, after *Cipollone*, there are two alternatives: Either: (1) the Safety Act's preemption clause expressly preempts common law claims that conflict with an on-point FMVSS, an argument that *Cipollone* makes even more forceful; or (2) the preemption clause, taken with the savings clause, is not a "reliable indicium" of Congress' intent, so there is "cause to look beyond" it, under *Cipollone*, to implied preemption.

* * *

The Florida appellate court's preemption decision in this case is squarely based on *Myrick*. Just as the Court granted certiorari in *Myrick*, it should grant certiorari here. In the alternative, the Court should hold this Petition pending its decision in *Myrick*, and in the event of a reversal, grant certiorari and either decide this case or vacate the Florida court's decision, and remand the case for decision in accordance with this Court's decision in *Myrick*.

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regulations, those regulations will preempt inconsistent state [law] by the simple operation of the Supremacy Clause." *Lincoln Sav. and Loan Assn. v. Federal Home Bank Bd.*, 856 F.2d 1558, 1560 (D.C. Cir. 1988). Here, NHTSA acted under a broad delegation of congressional power. NHTSA acted within its authority in granting FMVSS 208's options. *Public Citizen v. Steed*, 851 F.2d 444, 450 (D.C. Cir. 1988); *State Farm Mutual Ins. Co. v. Dole*, 802 F.2d 474 (D.C. Cir. 1986), *cert. denied, New York v. Dole*, 480 U.S. 951 (1987). That federal option-based regulation preempts state law claims that would take any of the options away. Pp. 24-27, below.

III. EVEN IF MYRICK IS AFFIRMED, CERTIORARI IS APPROPRIATE HERE.

Whatever the decision on the merits in *Myrick*, the Court should grant certiorari here. For the issue in any preemption case is whether Congress intended to preempt a state law that, as applied in the case at hand, flatly conflicts with the federal statute – or regulations under the statute – that contains the clause. Whatever the preemptive effect of FMVSS 121, the federal standard at issue in *Myrick*, FMVSS 208 preempts plaintiff's claims here. For all three branches of the United Sates government have concurred that, whatever the effect of other regulations, FMVSS 208 preempts claims that would take away its options.[19]

The reasons are simple: FMVSS 208 is unique in the Safety Act, and claims like plaintiff's are unique in Safety Act litigation. *See, e.g., Wood*, 865 F.2d at 413, 418 (FMVSS 208 claims are "unique" and "first raised" the preemption issue); *Gills*, 829 F. Supp. at 897 (referring to FMVSS 208's "unique characteristics"); *Welsh v. Century Products, Inc.*, 745 F. Supp. 313, 321 (D. Md. 1990) ("FMVSS 208 is an unusual regulation"). Congress mandated in 1974, in then-§ 1410(b) of the Safety Act, that NHTSA grant manufacturers restraint system options. No other provision of the Safety Act mandates options of any kind, as to any other regulation. FMVSS 208, in turn, grants manufacturers those restraint system options. No other safety

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[19] For sake of simplicity, we will refer to the *Myrick* claims, which arguably conflict with FMVSS 121, as the "FMVSS 121 claims," and to claims that take away an FMVSS 208 option as "FMVSS 208 claims."

regulation shares FMVSS 208's rich regulatory history reflecting NHTSA's conclusion, over years, that options are the best means to the safety goal, and that mandating a single kind of passive restraint "runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems." 49 Fed. Reg. at 29001 (1984). Moreover, most Safety Act standards are performance, not design, standards. The "usual common law action for design defect," however, "creates a design standard rather than a performance standard." Therefore, a "direct conflict between a common law design standard and a Safety Act performance standard" is a "rare event indeed." *Wood*, 865 F.2d at 402 n.9, 416. FMVSS 208 speaks to particular types of restraint systems, and how they are designed. Thus, it uniquely has "elements of a design standard," and so FMVSS 208 claims present that "rare event." 865 F.2d at 417.

Finally, FMVSS 208 claims are unique because they potentially affect every car on the road. For every car has a restraint system and every accident potentially involves the restraint system; if people can second guess the federal option installed in every car, every accident becomes a potential FMVSS 208 case.

A. The Courts Have Held That, Because FMVSS 208 Is Unique, It Preempts Even If Other FMVSSs Do Not.

An overwhelming body of case law – essentially unanimous, until *Myrick* (n.3 above) – has found FMVSS 208 claims preempted. Some reach that conclusion by the express preemption route. They reason that Congress

meant what it said in the preemption clause, and preempted "any" state "standard" – including a common law "standard" – that is not "identical" to an on-point FMVSS. FMVSS 208 claims are premised on a common-law rule that would punish a manufacturer for choosing one FMVSS 208 option, rather than plaintiff's preferred option, and in effect requires the preferred option and takes away the option the manufacturer installed. That common-law standard is not "identical" to FMVSS 208, but flatly conflicts with it, and so is expressly preempted by the plain terms of § 1392(d). *See, e.g., Miranda*, 647 A.2d at 174; *Boyle*, 501 N.W.2d at 869; *Gills*, 829 F. Supp. at 898-99; *Montag*, 856 F. Supp. at 577; *Wattelet*, 676 F. Supp. at 1040; *Vanover*, 632 F. Supp. at 1096-97; *Cox*, 646 F. Supp. at 763; *Wickstrom*, 416 N.W.2d at 840; *Heftel*, 1988 WL 19615 at 2; *Nissan Motor Corp.*, 212 Cal. App. 3d at 982.

Other courts reach the preemption conclusion based on implied preemption. They reason that, even if Congress' express intent is unclear, FMVSS 208 claims conflict with the purposes of Congress and the Department of Transportation, in at least two ways. First, Congress mandated options in § 1410b, and the Department mandated them in FMVSS 208 because options, not a single kind of restraint system, best served the safety goal. Following this Court's decision in *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982), the courts held that a "state common law rule cannot take away the flexibility provided by a federal regulation," "cannot prohibit the exercise of a federally granted option," and cannot impose damages for doing "what a federal act or regulation 'authorized [one] to do.' " *Taylor*, 875 F.2d at 827. *Accord Pokorny*, 902 F.2d at 1125; *Wickstrom*, 416 N.W.2d at

841; *Baird*, 654 F. Supp. at 32; *Cox*, 646 F. Supp. at 763-64; *Dallas*, 725 F. Supp. at 906.

Second, FMVSS 208 claims destroy the uniformity of federal standards that Congress intended. FMVSS 208 allowed manufacturers a choice among restraint systems, and applied throughout the country. A state regulation requiring plaintiff's chosen system, not other options, would not be "identical" to that nationwide option-based rule, would effect non-uniformity, and so would be expressly preempted by § 1392(d). *Wood*, 865 F.2d at 408-09. Plaintiff's claim would require the same thing as that prohibited regulation, would be "tantamount to establishing" a "conflicting" state regulation, and so would have essentially the same "effect." *Wood*, 865 F.2d at 401-02, 410-11, 418 (quoting *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 627 (1st Cir. 1987)).[20] For if a Florida jury can require a particular option, and so impose a different standard from FMVSS 208, so can juries in other states. The upshot would be a patchwork of different restraint standards in different states, and a car lawful in one state would become unlawful when driven to another. *See Hughes*, 677 F. Supp. at 77-78 ("the vagaries of jury standards of safety could result in a different result in each suit brought"). That "type of ad hoc regulation is exactly what Congress sought to exclude. . . . " *Vanover*, 632 F. Supp. at 1096. FMVSS 208 claims thus would "destroy the national uniformity of the federal

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[20] As *Cipollone* holds, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." 112 S. Ct. at 2620 (quoting *San Diego Building Trades Council v. Garmon*, 395 U.S. 236, 247 (1959)).

standard and exceed the state's authority." *Wood*, 865 F.2d at 412. *Accord Kitts*, 875 F.2d at 789; *Wickstrom*, 416 N.W.2d at 841; *Staggs*, 678 F. Supp. at 272; *Hughes*, 677 F. Supp. at 77-78; *Cox*, 646 F. Supp. at 763-64.

In sum, the courts have held that FMVSSs are not all created equal for purposes of preemption, and have concluded that FMVSS 208 preempts, even though other FMVSSs do not. *Compare, e.g., Pokorny*, 902 F.2d at 1125 (3rd Cir. 1990) (Third Circuit finds FMVSS 208 preempts), *with Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 783 (3d Cir. 1992) (same court finds FMVSS 108 does not preempt); *compare Cox*, 646 F. Supp. 761 (FMVSS 208 preempts), *with Welsh v. Century Products, Inc.*, 745 F. Supp. 313, 321 (D. Md. 1990) (same court finds FMVSS 213 does not preempt because, unlike FMVSS 208, it "does not permit a manufacturer to choose among options"); *compare Kolbeck*, 702 F. Supp. 532 (Pennsylvania district court finds FMVSS 208 preempts), *with Swope v. SIT Transit Corp.*, 796 F. Supp. 160, 164 (E.D. Pa. 1992) (same court finds FMVSS 108 does not preempt because, unlike FMVSS 208, it "does not contemplate a flexible scheme that would be undermined by an imposition of common law liability").

B. The United States Has Stated That FMVSS 208 Preempts Common Law Claims That Take Away Its Options; The Government Has Not Expressed That View As To Any Other Regulation Or Common Law Claim.

NHTSA has made clear its view that federal law preempts FMVSS 208 claims like this one; NHTSA has not

expressed that view as to the effect of any other common law claim or any other regulation. In 1990, in response to a request from this Court, the Government filed a brief in the Court opposing certiorari in several federal circuit court cases finding FMVSS 208 preemption. The Government's brief speaks specifically to Secretary Dole's "final" rule, the version of FMVSS 208 that applied to the Hyundai here. The Government explained that diversity was a "critical feature" of that regulation, and that it reflected "the Secretary's policy judgment that safety will best be promoted if manufacturers install *alternative* protection systems in their fleets, rather than one particular system in every vehicle." Brief for the United States as Amicus Curiae, *Wood v. General Motors Corp.*, No. 89-46 (S. Ct., filed March 1990), at 13. The Government concluded that claims imposing damages for a manufacturer's failure to install airbags would "obviously eliminate the diversity that the secretary found necessary," would "*disserve* the *safety* purposes of the Act," and so would "stand as an obstacle" to the agency's objectives, in fact "drastically" interfere with them. *Id.* at 14, 15 (original emphasis).

C. Congress Expressly Stated Its Intent Not To Change The Preemption Case Law Under FMVSS 208.

At NHTSA's request, and again unique in Safety Act litigation, Congress has expressed its intent not to change the case law preempting airbag and other FMVSS 208 claims. Congress has not expressed that intent as to any other body of Safety Act case law of any kind.

Congress amended the Safety Act in 1991 to require airbags, prospectively. *See* Pub. L. No. 102-240, § 2508. In the House Conference Report, NHTSA alerted Congress that "most courts that have considered the matter have ruled that ["no airbag" claims, one kind of FMVSS 208 claim] are preempted by the [Safety Act] and/or the safety standards issued by NHTSA." Nov. 7 letter from NHTSA cited in H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1783. NHTSA also cautioned Congress that the amendments could call these preemption rulings into question, and that if Congress adopted a mandatory-airbag rule, it was "possible that some courts would conclude that these claims are no longer preempted." *Id.*

Congress responded by specifying that the 1991 amendment requiring airbags prospectively

> shall [not] be construed by any * * * court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints.

Pub. L. No. 102-240, § 2508(d).

Thus, having been specifically apprised of the overwhelming authority finding claims like plaintiff's preempted, Congress expressly did "not want by this section to change" those cases. H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1783. Congress' express acceptance of the case law interpreting the preemptive reach of FMVSS 208 confirms that its legislative intent was properly gauged by that case law. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267,

275 (1974); *Tiger v. Western Investment Co.*, 221 U.S. 286, 309 (1911).

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the District Court of Appeal of Florida, Third District. In the alternative, the Court should hold this Petition and then either grant review or vacate the court of appeal's decision and remand the case for reconsideration in light of *Myrick* until the disposition in *Myrick*.

Respectfully submitted,

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November 11, 1994.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, 1994

HYUNDAI MOTOR COMPANY (KOREA), et al.,	**	
Appellants,	**	CASE NO.
vs.	**	93-1234
EVELYN PHILLIP, as Personal Representative of the Estate of ANN MARIE PHILLIP, deceased,	**	
Appellee.	**	

Opinion filed July 12, 1994.

An Appeal from the Circuit Court of Dade County, Maria M. Korvick, Judge.

Cabaniss, Burke & Wagner, Francis M. McDonald, Jr., Tracy Troutman Cheek, Orlando, and Leslie Landau, Miami, for appellants.

Cooper & Wolfe, Michael Seth Cohen, Marc Cooper and Maureen E. Lefebvre, Miami, for appellee.

Before BARKDULL, JORGENSON and GODERICH, JJ.

GODERICH, Judge.

The defendants, Hyundai Motor Company (Korea), Hyundai Motor America, and Central Hyundai Company

d/b/a Central Hyundai [collectively referred to as "Hyundai"], appeal from an adverse jury verdict. We affirm.

Hyundai installed an automatic belt or passive restraint system that consists of a two-point shoulder belt without a lap belt, a reinforced ramped seat and an enhanced knee bolster in its 1988 Hyundai Excel which was one of the types of restraint systems authorized by Federal Motor Vehicle Safety Standard 208 [FMVSS 208], 49 C.F.R. § 571.208 (1987), a safety standard established by the National Traffic Safety Administration pursuant to the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 et seq. Ann Marie Phillip was involved in an accident while driving a 1988 Excel. As a result of the accident, her liver was cut in half and she died. Evelyn Phillip, as personal representative of the estate of her daughter, Ann Marie, filed a complaint against Hyundai alleging negligence and strict liability in the design of the restraint system in the 1988 Excel. Hyundai moved for summary judgment on the ground that the plaintiff's claim was preempted as a matter of law. The trial court denied the motion.

The jury found the restraint system defective and awarded the plaintiff $2.4 million. The trial court summarily denied Hyundai's motion for new trial and remittitur. Hyundai appealed.

Hyundai contends that the trial court erred in denying Hyundai's motion for summary judgment where federal law (FMVSS 208 and its enabling legislation, the National Traffic and Motor Vehicle Safety Act) preempts

the plaintiff's claim that the car was defective because of the lack of a lap belt. We disagree.

Based on the authority of *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994); *Perry v. Mercedes Benz of N. Am., Inc.*, 957 F.2d 1257 (5th Cir. 1992); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 782 (1990), we find that the National Traffic and Motor Vehicle Safety Act does not preempt the plaintiff's common law tort claims against Hyundai.

Next, Hyundai argues that the trial court abused its discretion in denying its motion for a new trial where the following prejudicial error were committed during trial: (1) plaintiff's counsel referred to other lawsuits and accidents despite the trial court's order in limine prohibiting reference to other lawsuits; (2) the trial court failed to grant Hyundai's motion for directed verdict despite plaintiff's failure to introduce facts to support her claims; and (3) the trial court did not permit Hyundai to exercise a peremptory challenge as to juror Wilson, forcing Hyundai to accept juror Wilson.

The trial court granted Hyundai's request for a motion in limine that prohibited the plaintiff from introducing "any evidence of the number or magnitude of other claims and accidents without prior court approval." Hyundai claims that plaintiff's counsel repeatedly violated this ruling during its cross examination of Hyundai's expert, Terry Thomas. A careful review of the record, however, shows that the plaintiff did not violate

this order. Moreover, the plaintiff did not improperly elicit any testimony of dissimilar accidents. *See Railway Express Agency, Inc. v. Fulmer,* 227 So. 2d 870 (Fla. 1969); *Chambers v. Loftin,* 67 So. 2d 220 (Fla. 1953); *Short v. Allen,* 254 So. 2d 34 (Fla. 3d DCA 1971). The jury merely heard the phrase "the Alvarado case" three times, with no further details or explanation. Accordingly, the trial court did not abuse its discretion in denying Hyundai's motion for mistrial on this ground. *See Compania de Aviacion v. Knapp,* 251 So. 2d 18 (Fla. 3d DCA), *cert. denied,* 256 So. 2d 6 (Fla. 1971); *Morin v. Halpern,* 139 So. 2d 495 (Fla. 2d DCA 1962).

We cannot review Hyundai's contention that it is entitled to a directed verdict because of a lack of proof that an accident occurred because it did not timely object when the plaintiff's experts recounted the facts of the accident. *See Tallahassee Furniture Co., Inc. v. Harrison,* 583 So. 2d 744 (Fla. 1st DCA 1991), *rev. denied,* 595 So. 2d 558 (Fla. 1992); Frank v. Ruwitch, 318 So. 2d 188 (Fla. 3d DCA 1975), *cert. denied,* 330 So. 2d 725 (Fla. 1976); *Nat Harrison Assocs., Inc. v. Byrd,* 256 So. 2d 50 (Fla. 4th DCA 1971).

Similarly, there is nothing for this court to review on the peremptory challenge issue because Hyundai withdrew its challenge to juror Wilson. *See Santa Fe Dev. Corp. v. Randolph,* 506 So. 2d 18 (Fla. 3d DCA 1987).

For the foregoing reasons, we affirm the final judgment entered on the jury verdict in favor of the plaintiff.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1994
AUGUST 16, 1994

HYUNDAI MOTOR COMPANY (KOREA), et al.,	**	
Appellants,	**	CASE NO.
vs.	**	93-1234
EVELYN PHILLIP, as Personal Representative of the Estate of ANN MARIE PHILLIP, deceased,	**	
Appellee.	**	

Upon consideration, "Appellants, Hyundai Motor Company, Hyundai Motor America and Central Hyundai Company's Motion for Rehearing" is hereby denied. Barkdull, Jorgenson and Goderich, JJ., concur.

A true Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court
of Appeal, Third District

By /s/ Anita Illegible
Deputy Clerk

cc: Tracy Troutman Cheek
Sharon L. Wolfe
[SEAL]

Michael Seth Cohen
Leslie G. Landau

§ 571.208 Standard No. 208; Occupant crash protection.

S1. *Scope.* This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. *Purpose.* The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

S3. *Application.* This standard applies to passenger cars, multipurpose passenger vehicles, trucks, and buses. In addition, S9., *Pressure vessels and explosive devices,* applies to vessels designed to contain a pressurized fluid or gas, and to explosive devices, for use in the above types of motor vehicles as part of a system designed to provide protection to occupants in the event of a crash.

S4. *General requirements.*

S4.1 *Passenger cars.*

S4.1.1 *Passenger cars manufactured from January 1, 1972, to August 31, 1973.* Each passenger car manufactured from January 1, 1972, to August 31, 1973, inclusive, shall meet the requirements of S4.1.1.1, S4.1.1.2, or S4.1.1.3. A protection system that meets the requirements of S4.1.1.1, or S4.1.1.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.1.3

S4.1.1.1 *First option – complete passive protection system.* The vehicle shall meet the crash protection requirements of S5. by means that require no action by vehicle occupants.

S4.1.1.2 *Second option – lap belt protection system with belt warning.* The vehicle shall –

(a) At each designated seating position have a Type 1 seatbelt assembly or a Type 2 seatbelt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard;

(b) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3; and

(c) Meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with respect to anthropomorphic test devices in each front outboard designated seating position restrained only by Type 1 seat belt assemblies.

S4.1.1.3 *Third option – lap and shoulder belt protection system with belt warning.*

S4.1.1.3.1 Except for convertibles and open-body vehicles, the vehicle shall –

(a) At each front outboard designated seating position have a Type 2 seatbelt assembly that conforms to § 571.209 and S7.1 and S7.2 of this standard, with either an integral or detachable upper torso portion, and a seatbelt warning system that conforms to S7.3;

(b) At each designated seating position other than the front outboard positions, have a Type 1 or Type 2 seat

belt assembly that conforms to § 571.209 and to S7.1 and S7.2 of this standard; and

(c) When it perpendicularly impacts a fixed collision barrier, while moving longitudinally forward at any speed up to and including 30 m.p.h., under the test conditions of S8.1 with anthropomorphic test devices at each front outboard position restrained by Type 2 seatbelt assemblies, experience no complete separation of any load-bearing element of a seatbelt assembly or anchorage.

S4.1.1.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seatbelt assembly that conforms to § 571.209 and to S7.1 and S7.2 of this standard, and at each front outboard designated seating position have a seatbelt warning system that conforms to S7.3

S4.1.2 *Passenger cars manufactured on or after September 1, 1973, and before September 1, 1986.* Each passenger car manufactured on or after September 1, 1973, and before September 1, 1986, shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A protection system that meets the requirements of S4.1.2.1 or S4.1.2.2. may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

S4.1.2.1 *First option – frontal/angular automatic protection system. The vehicle shall:*

(a) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At the front center designated seating position and at each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) *Either.* (1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front outboard designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2 *Second option – head-on automatic protection system.* The vehicle shall –

(a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.

(b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of

S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

S4.1.2.3 *Third option – lap and shoulder belt protection system with belt warning.*

S4.1.2.3.1 Except for convertibles and open-body vehicles, the vehicle shall –

(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3. The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seatbelt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard.

S4.1.2.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No.

209 (§ 571.209) and to S7.1 and S7.2 of this standard, and at each front designated seating position have a seat belt warning system that conforms to S7.3.

S4.1.3 *Passenger cars manufactured on or after September 1, 1986, and before September 1, 1989.*

S4.1.3.1 *Passenger cars manufactured on or after September 1, 1986, and before September 1, 1987.*

S4.1.3.1.1 Subject to S4.1.3.1.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1986, and before September 1, 1987, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.1.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars, specified in S4.1.3.1.1 complying with the requirements of S4.1.2.1 shall be not less than 10 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1983, and before September 1, 1986, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.1.1.

S4.1.2.1.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.1.2(a) or its annual production under S4.1.3.1.2(b).

S4.1.3.2 *Passenger cars manufactured on or after September 1, 1987, and before September 1, 1988.*

S4.1.3.2.1 Subject to S4.1.3.2.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1987, and before September 1, 1988, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.2.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars specified in S4.1.3.2.1 complying with the requirements of S4.1.2.1, shall be not less than 25 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1984, and before September 1, 1987, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.2.1.

S4.1.3.2.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.2.2(a) or its annual production under S4.1.3.2.2(b).

S4.1.3.3 *Passenger cars manufactured on or after September 1, 1988, and before September 1, 1989.*

S4.1.3.3.1 Subject to S4.1.3.3.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1988, and before September 1, 1989, shall comply with the

requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.3.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars specified in S4.1.3.3.1 complying with the requirements of S4.1.2.1 shall be not less than 40 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1985, and before September 1, 1988, by each manufacturer or

(b) The manufacturer's annual production of passenger cares during the period specified in S4.1.3.3.1.

S4.1.3.3.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.3.2(a) or its annual production under S4.1.3.3.2(b).

* * *

S4.1.4 Passenger cars manufactured on or after September 1, 1989, but before September 1, 1996.

S4.1.4.1 Except as provided in S4.1.4.2, each passenger car manufactured on or after September 1, 1989 shall comply with the requirements of S4.1.2.1. Any passenger car manufactured on or after September 1, 1989 and before September 1, 1993 whose driver's designated seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt

and whose right front designated seating position is equipped with a manual Type 2 seat belt so that the seating position complies with the occupant crash protection requirements of S5.1, with the Type 2 seat belt assembly adjusted in accordance with S7.4.2, shall be counted as a vehicle complying with S4.1.2.1. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not know in the exercise of due care that such vehicle is not in conformity with this standard.

* * *

S4.1.5 *Passenger cars manufactured on or after September 1, 1996.*

S4.1.5.1 *Frontal/angular automatic protection system.*

(a) Each passenger car manufactured on or after September 1, 1996 shall:

(1) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(2) At any front designated seating positions that are not "outboard designated seating positions," as that term is defined at 49 CFR 571.3, and at any rear designated seating positions that are not "rear outboard designated seating positions," as that term is defined at S4.1.4.2(c) of this standard, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 and S7.2 of this standard; and

(3) At each front designated seating position that is an "outboard designated seating position," as that term is

defined at 49 CFR 571.3, and at each rear designated seating position that is a "rear outboard designated seating positions," as that term is defined at S4.1.4.2(c) of this standard, have a Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 through S7.3 of this standard, and, in the case of the Type 2 seat belt assemblies installed at the front outboard designated seating positions, meet the frontal crash protection requirements with the appropriate anthropomorphic test dummy restrained by the Type 2 seat belt assembly in addition to the means that requires no action by the vehicle occupant.

(b) For the purposes of this section, an *inflatable restraint system* means an air bag that is activated in a crash.

S4.1.5.2 *Passenger cars manufactured on or after September 1, 1996 and before September 1, 1997.*

S4.1.5.2.1 The amount of passenger cars complying with the requirement of S4.1.5.1(a)(1) by means of an inflatable restraint system at the driver's and right front passenger's position shall be not less than 95 percent of the manufacturer's total production of passenger cars manufactured on or after September 1, 1996, and before September 1, 1997. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

* * *

S4.1.5.3 *Passenger cars manufactured on or after September 1, 1997.* Each passenger car manufactured on or

after September 1, 1997 shall comply with the requirement of S4.1.5.1(a)(1) by means of an inflatable restraint system at the driver's and right front passenger's position. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.2 *Trucks and multipurpose passenger vehicles with a GVWR of 10,000 pounds or less.* As used in this section, *vehicles manufactured for operation by persons with disabilities* means vehicles that incorporate a level change device (e.g., a wheelchair lift or a ramp) for onloading or offloading an occupant in a wheelchair, an interior element of design intended to provide the vertical clearance necessary to permit a person in a wheelchair to move between the lift or ramp and the driver's position or to occupy that position, and either an adaptive control or special driver seating accommodation to enable persons who have limited use of their arms or legs to operate a vehicle. For purposes of this definition, special driver seating accommodations include a driver's seat easily removable with means installed for that purpose or with simple tools, or a driver's seat with extended adjustment capability to allow a person to easily transfer from a wheelchair to the driver's seat.

S4.2.1 *Trucks and multipurpose passenger vehicles with a GVWR of 10,000 pounds or less, manufactured on or after January 1, 1976 and before September 1, 1991.* Each truck and multipurpose passenger vehicle, with a gross vehicle weight rating of 10,000 pounds or less, manufactured before September 1, 1991, shall meet the requirements of

S4.1.2.1, or at the option of the manufacturer, S4.1.2.2 or S4.1.2.3 (as specified for passenger cars), except that forward control vehicles manufactured prior to September 1, 1981, convertibles, open-body type vehicles, walk-in van-type trucks, motor homes, vehicles designed to be exclusively sold to the U.S. Postal Service, and vehicles carrying chassis-mount campers may instead meet the requirements of S4.2.1.1 or S4.2.1.2.

S4.2.1.1 *First option – complete automatic protection system.* The vehicle shall meet the crash protection requirements of S5 by means that require no action by vehicle occupants.

S4.2.1.2 *Second option – belt system.* The vehicle shall have seat belt assemblies that conform to Standard 209 installed as follows:

(a) A Type 1 or Type 2 seat belt assembly shall be installed for each designated seating position in convertibles, open-body type vehicles, and walk-in van-type trucks.

(b) In all vehicles except those for which requirements are specified in S4.2.1.2(a), a Type 2 seat belt assembly shall be installed for each outboard designated seating position that includes the windshield header within the head impact area, and a Type 1 or Type 2 seat belt assembly shall be installed for each other designated seating position.

S4.2.2 *Trucks and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less, manufactured on or after September 1, 1991 and before September 1, 1997.* Except as

provided in S4.2.4, each truck and multipurpose passenger vehicle, with a gross vehicle weight rating of 8,500 pounds or less and an unloaded vehicles weight of 5,500 pounds or less, manufactured on or after September 1, 1991 and before September 1, 1997, shall meet the requirements of S4.1.2.1, or at the option of the manufacturer, S4.1.2.2 or S4.1.2.3 (as specified for passenger cars), except that convertibles, open-body type vehicles, walk-in van-type trucks, motor homes, vehicles designed to be exclusively sold to the U.S. Postal Service, vehicles carrying chassis-mount campers, and vehicles manufactured for operation by persons with disabilities may instead meet the requirements of S4.2.1.1 or S4.2.1.2. Each Type 2 seat belt assembly installed in a front outboard designated seating position in accordance with S4.1.2.3 shall meet the requirements of S4.6.

S4.2.3 *Trucks and multipurpose passenger vehicles manufactured on or after September 1, 1991 with either a GVWR or more than 8,500 pounds but not greater than 10,000 pounds or with an unloaded vehicle weight greater than 5,500 pounds and a GVWR of 10,000 pounds or less.* Except as provided in S4.2.4, each truck and multipurpose passenger vehicle manufactured on or after September 1, 1991, that has either a gross vehicle weight rating which is greater than 8,500 pounds, but not greater than 10,000 pounds, or has an unloaded vehicle weight greater than 5,500 pounds and a GVWR of 10,000 pounds or less, shall meet the requirements of S4.1.2.1, or at the option of the manufacturer, S4.1.2.2 or S4.1.2.3 (as specified for passenger cars), except that convertibles, open-body type vehicles, walk-in van-type trucks, motor homes, vehicles designed to be exclusively sold to the U.S. Postal Service, and vehicles

carrying chassis-mount campers may instead meet the requirements of S4.2.1.1 or S4.2.1.2.

* * *

S4.2.5 *Trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1994, and before September 1, 1997.*

S4.5.1 *Trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1994, and before September 1, 1995.*

S4.2.5.1.1 Subject to S4.2.5.1.2 and S4.2.5.5 and except as provided in S4.2.4, each truck, bus and multipurpose passenger vehicle, other than walk-in van-type trucks, vehicles designed to be exclusively sold to the U.S. Postal Service, and vehicles manufactured for operation by persons with disabilities, with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less that is manufactured on or after September 1, 1994 and before September 1, 1995, shall comply with the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3 (as specified for passenger cars). A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of standard.

S4.2.5.1.2 Subject to S4.2.5.5, the amount of trucks, buses, and multipurpose passenger vehicles specified in S4.2.5.1.1 complying with S4.1.2.1 (as specified for passenger cars) shall be not less than 20 percent of:

(a) The average annual production of trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1991, and before September 1, 1994, by each manufacturer that produced such vehicles during each of those annual production periods, or

(b) The manufacturer's total production of trucks, buses, and multipurpose passenger vehicle with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less during the period specified in S4.2.5.1.1.

S4.2.5.2 *Trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1995 and before September 1, 1996.*

S4.2.5.2.1 Subject to S4.2.5.2.2 and S4.2.5.5 and except as provided in S4.2.4, each truck, bus, and multipurpose passenger vehicle, other than walk-in van-type trucks, vehicles designed to be exclusively sold to the U.S. Postal Service, and vehicles manufactured for operation by persons with disabilities, with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less that is manufactured on or after September 1, 1995 and before September 1, 1996, shall comply with the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3 (as specified for passenger cars). A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.2.5.2.2 Subject to S4.2.5.5, the amount of trucks, buses, and multipurpose passenger vehicles specified in S4.2.5.2.1 complying with S4.1.2.1 (as specified for passenger cars) shall be not less than 50 percent of:

(a) The average annual production of trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1992, and before September 1, 1995, by each manufacturer that produced such vehicles during each of those annual production periods, or

(b) The manufacturer's total production of trucks, buses, and multipurpose passenger vehicle with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less during the period specified in S4.2.5.2.1.

S4.2.5.3 *Trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1996 and before September 1, 1997.*

S4.2.5.3.1 Subject to S4.2.5.3.2 and S4.2.5.5 and except as provided in S4.2.4, each truck, bus, and multipurpose passenger vehicle, other than walk-in van-type trucks, vehicles designed to be exclusively sold to the U.S. Postal Service, and vehicles manufactured for operation by persons with disabilities, with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less that is manufactured on or after September 1, 1996 and before September 1, 1997, shall comply with the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3 (as specified for passenger cars). A vehicle shall not be

deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.2.5.3.2 Subject to S4.2.5.5, the amount of trucks, buses, and multipurpose passenger vehicles specified in S4.2.5.3.1 complying with S4.1.2.1 (as specified for passenger cars) shall be not less than 90 percent of:

(a) The average annual production of trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1993, and before September 1, 1996, by each manufacturer that produced such vehicles during each of those annual production periods, or

(b) The manufacturer's total production of trucks, buses, and multipurpose passenger vehicle with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less during the period specified in S4.2.5.3.1.

S4.2.5.4 *Alternative phase-in schedule.* A manufacturer may, at its option, comply with the requirements of this section instead of complying with the requirements set forth in S4.2.5.1, S4.2.5.2, and S4.2.5.3.

(a) Except as provided in S4.2.4, each truck, bus, and multipurpose passenger vehicle, other than walk-in van-type trucks, vehicles designed to be exclusively sold to the U.S. Postal Service, and vehicles manufactured for operation by persons with disabilities, with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of

5,500 pounds or less that is manufactured on or after September 1, 1994 and before September 1, 1995 shall comply with the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3 (as specified for passenger cars).

(b) Except as provided in S4.2.4, each truck, bus, and multipurpose passenger vehicle, other than walk-in van-tape trucks, vehicles designed to be exclusively sold to the U.S. Postal Service, and vehicles manufactured for operation by persons with disabilities with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less that is manufactured on or after September 1, 1995 shall comply with the requirements of S4.1.2.1 (as specified for passenger cars) of this standard. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

(c) Each truck, bus, and multipurpose passenger vehicle with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1995, but before September 1, 1998, whose driver's seating position complies with the requirements of S4.1.2.1(a) of this standard by means not including any type of seat belt and whose right front passenger's seating position is equipped with a manual Type 2 seat belt that complies with S5.1 of this standard, with the seat belt assembly adjusted in accordance with S7.4.2, shall be counted as a vehicle complying with S4.1.2.1.

* * *

S4.2.6 *Trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1997.* Each truck, bus, and multipurpose passenger vehicle with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less, which is manufactured on or after September 1, 1997, shall comply with the requirements of S4.1.5.1 of this standard (as specified for passenger cars), except that walk-in van-type trucks and vehicles designed to be sold exclusively to the U.S. Postal Service may meet the requirements of S4.2.1.1 or S4.2.1.2 of this standard instead of the requirements of S4.1.5.1.

S4.2.6.1 *Trucks, buses, and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1997 and before September 1, 1998.*

S4.2.6.1.1 The amount of trucks, buses, and multipurpose passenger vehicles complying with the requirements of S4.1.5.1(a)(1) of this standard by means of an inflatable restraint system shall be not less than 80 percent of the manufacturer's total combined production of subject vehicles manufactured on or after September 1, 1997 and before September 1, 1998. Each truck, bus, or multipurpose passenger vehicle with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less manufactured on or after September 1, 1997 and before September 1, 1998, whose driver's seating position complies with S4.1.5.1(a)(1) by means of an

inflatable restraint system and whose right front passenger's seating position is equipped with a manual Type 2 seat belt assembly that complies with S5.1 of this standard, with the seat belt assembly adjusted in accordance with S7.4.2 of this standard, shall be counted as a vehicle complying with S4.1.5.1(a)(1) by means of an inflatable restraint system. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

* * *

S4.3 *Trucks and multipurpose passenger vehicles, with GVWR of more than 10,000 pounds.*

S4.3.1 *Trucks and multipurpose passenger vehicles with a GVWR of more than 10,000 pounds, manufactured in or after January 1, 1972 and before September 1, 1990.* Each truck and multipurpose passenger vehicle with a gross vehicle weight rating of more than 10,000 pounds, manufactured on or after January 1, 1972 and before September 1, 1990, shall meet the requirements of S4.3.1.1 or S4.3.1.2. A protection system that meets the requirements of S4.3.1.1 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.3.1.2.

S4.3.1.1 *First option – complete passenger protection system.* The vehicle shall meet the crash protection requirements of S5 by means that require no action by vehicle occupants.

S4.3.1.2 *Second option – belt system.* The vehicle shall, at each designated seating position, have either a Type 1 or a Type 2 seat belt assembly that conforms to S571.209.

S4.3.2 *Trucks and multipurpose passenger vehicles with a GVWR of more than 10,000 pounds, manufactured on or after September 1, 1990.* Each truck and multipurpose passenger vehicle with a gross vehicle weight rating of more than 10,000 pounds, manufactured on or after September 1, 1990, shall meet the requirements of S4.3.2.1 or S4.3.2.2. A protection system that meets the requirements of S4.3.2.1 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.3.2.2.

S4.3.2.1 *First option – complete passenger protection system.* The vehicle shall meet the crash protection requirements of S5 by means that require no action by vehicle occupants.

S4.3.2.2 Second option – belt system. The vehicle shall, at each designated seating position, have either a Type 1 or a Type 2 seat belt assembly that conforms to §571.209 of this part and S7.2 of this Standard. A Type 1 belt assembly or the pelvic portion of a dual retractor Type 2 belt assembly installed at a front outboard seating position shall include either an emergency locking retractor or an automatic locking retractor. If a seat belt assembly installed at a front outboard seating position includes an automatic locking retractor for the lap belt or the lap belt portion, that seat belt assembly shall comply with the following:

(a) An automatic locking retractor used at a front outboard seating position that has some type of suspension system for the seat shall be attached to the seat structure that moves as the suspension system functions.

(b) The lap belt or lap belt portion of a seat belt assembly equipped with an automatic locking retractor that is installed at a front outboard seating position must allow at least 3/4 inch, but less than 3 inches, of webbing movement before retracting webbing to the next locking position.

(c) Compliance with S4.3.2.2(b) of this standard is determined as follows:

(1) The seat belt assembly is buckled and the retractor end of the seat belt assembly is anchored to a horizontal surface. The webbing for the lap belt or lap belt portion of the seat belt assembly is extended to 75 percent of its length and the retractor is locked after the initial adjustment.

(2) A load of 20 pounds is applied to the free end of the lap belt or the lap belt portion of the belt assembly (i.e., the end that is not anchored to the horizontal surface) in the direction away from the retractor. The position of the free end of the belt assembly is recorded.

(3) Within a 30 second period, the 20 pound load is slowly decreased, until the retractor moves to the next locking position. The position of the free end of the belt assembly is recorded again.

(4) The difference between the two positions recorded for the free end of the belt assembly shall be at least 3/4 inch but less than 3 inches.

* * *

S4.5.3 *Automatic belts.* Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as an "automatic belt") may be used to meet the crash protection requirements of any option under S4. and in place of any seat belt assembly otherwise required by that option.

S4.5.3.1. An automatic belt that provides only pelvic restraint may not be used pursuant to S4.5.3 to meet the requirements of an option that requires a Type 2 seat belt assembly. An automatic belt may not be used pursuant to S4.5.3 to meet the requirements of S4.1.5.1(a)(3) for a Type 2 seat belt assembly at any seating position equipped with an inflatable restraint system pursuant to S4.1.5.2, S4.1.5.3, S4.2.6.1, or S4.2.6.2 of this standard.

S4.5.3.2 An automatic belt, furnished pursuant to S4.5.3, that provides both pelvic and upper torso restraint may have either a detachable or nondetachable upper torso portion, notwithstanding provisions of the option under which it is furnished.

* * *

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No. 94-867

In The
Supreme Court Of The United States

October Term 1994

HYUNDAI MOTOR COMPANY, et al.,

Petitioners,

vs.

EVELYN PHILLIP,

Respondent.

On Petition For A Writ Of Certiorari To The District Court of Appeal of Florida, Third District

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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JURISDICTION

Hyundai asks this Court to review a final judgment based on a jury verdict which was affirmed by Florida's Third District Court of Appeal. It claims that this Court has jurisdiction pursuant to 28 U.S.C. § 1257. Hyundai is wrong.

This Court's jurisdiction to review state court judgments is limited. This Court may issue writs of certiorari to review "[f]inal judgments or decrees *rendered by the highest court of a State in which a decision could be had*" on matters of federal law. 28 U.S.C. § 1257(a). However, the final judgment Hyundai asks this Court to review was not rendered by such a court. Consequently, this Court does not have jurisdiction.

The decision here was rendered by Florida's Third District Court of Appeal, an intermediate appellate court. The Florida Supreme Court is the state's highest court. Fla. Const. art. V. Obviously, if further review could have been sought in the Florida Supreme Court, then the Third District's decision was not rendered by the highest court in Florida in which review could be had. Thus, this Court's jurisdiction depends on whether the Florida Supreme Court had jurisdiction to review this decision. If it did, then Hyundai's failure to seek that review precludes jurisdiction here. A long line of precedent demonstrates this Court's unwavering devotion to this basic principle. *E.g.*, *Costarelli v. Massachusetts*, 421 U.S. 193 (1975); *Banks v. California*, 395 U.S. 708 (1969); *McMaster v. Gould*, 276 U.S. 284 (1928); *Matthews v. Huwe*, 269 U.S. 262 (1925); *Stratton v. Stratton*, 239 U.S. 55 (1915); *Mullen v. Western Union Beef Co.*, 173 U.S. 116 (1899); *Fisher v. Carrico*, 122 U.S. 522 (1887). The limitation applies even if the Florida Supreme Court's jurisdiction was purely discretionary; the Florida Supreme Court had to be given the opportunity to exercise that discretion. *E.g.*, *Stratton*, 239 U.S. 55 (Court did not have jurisdiction to review decision of Ohio intermediate appellate court where Ohio Supreme Court had discretion to review decision but petitioner did not seek review).

The Florida Supreme Court's jurisdiction to review decisions

by the district courts of appeal is set out in the Florida Constitution. It may review district court decisions which conflict with decisions of other district courts or the Florida Supreme Court. Fla. Const. art. V, § 3(b)(3); Fla.R.App.P. 9.030(2)(iv). It may also review district court decisions which pass upon questions which the district court certifies to be of great public importance. Fla. Const. art. V, § 3(b)(4); Fla.R.App.P. 9.030(2)(v).

Phillip and Hyundai agree the Florida Supreme Court did not have conflict jurisdiction to review this decision. However, this agreement does not confer jurisdiction on this Court since conflict is not the sole basis for Florida Supreme Court review. Hyundai could have moved the Third District to certify the question as one of great public importance. It did not do so. If the Third District agreed to certify the question, the Florida Supreme Court would have had discretionary jurisdiction under the state constitution and Fla.R.App.P. 9.030(2)(v).[1/]

A party has the right to request certification by the district court. "A motion for . . . certification may be filed within 15 days of an order or within such other time set by the court." Fla.R.App.P. 9.330(a). *See, e.g., Parker v. Leon County*, 601

1/ Hyundai claims that Phillip acknowledged the Florida Supreme Court had no jurisdiction to review the Third District's decision:

> Indeed, in opposing a stay of execution pending Hyundai's efforts to seek review in the Florida Supreme Court or in this Court, plaintiff stated that "[t]he required basis for Florida Supreme Court jurisdiction does not exist. *See* Fla.R.App.P. 9.030(a)(2)."

Hyundai's Petition at 1 n.2. This is a misleading abbreviation of Phillip's argument. Hyundai lifted this quotation out of context from a paragraph which dealt with whether Hyundai could show a likelihood of success in the Florida Supreme Court. Hyundai ignores the two sentences Phillip wrote which precede the quoted sentence: "This Court's decision has not been certified to be one of great public importance; *Hyundai never even moved for such certification*. The required basis for Florida Supreme Court jurisdiction does not exist." Thus, Phillip never conceded that Hyundai had exhausted its state remedies. To the contrary, Phillip pointed out that Hyundai abandoned those remedies. Its abandonment of those remedies is central to this Court's jurisdiction.

So.2d 1223 (Fla. 1st DCA 1992); *Emerald Acres Inv., Inc. v. Bd. of County Comm'rs*, 601 So.2d 577 (Fla. 1st DCA 1992) (both granting motion to certify question to Florida Supreme Court). A district court may deny rehearing but grant the motion for certification. *E.g.*, *Suazo v. Del Busto*, 587 So.2d 480 (Fla. 3d DCA 1991); *Wright v. State*, 585 So.2d 321 (Fla. 5th DCA 1991). Indeed, a party may move for certification without moving for rehearing. *In re The Fla. Bar Rules of App. Pro.*, 529 So.2d 687 (Fla. 1988). A motion for certification may be granted when the issue is one on which the Florida Supreme Court should be given the opportunity to pass, but there is no conflict which would allow the court to take jurisdiction. *Wyche v. State*, 573 So.2d 953, 955 (Fla. 2d DCA 1991).

That is the situation here. The Florida Supreme Court did not have conflict jurisdiction. However, Hyundai had the option of asking to have the question certified. The very lack of conflict indicated that Hyundai should have asked for a certified question if it wanted further review of the case. Hyundai chose not to take advantage of that option. Having failed to seek certification to the Florida Supreme Court, Hyundai cannot claim now that the Third District's decision was "rendered by the highest court of a State in which a decision could be had."

Gotthilf v. Sills, 375 U.S. 79 (1963), is on point. In that case, New York's Appellate Division affirmed a trial court order. The Court of Appeals denied petitioner's motion for leave to appeal because the order was not a final one; it dismissed an appeal as of right on the same ground. However, New York law allowed the petitioner to request the Appellate Division to certify the question to the Court of Appeals; the petitioner failed to take advantage of that right. As a result, this Court held that it could not review the matter because the decision was not from the highest state court in which review could be had.

> Section 589 of the New York Civil Practice Act provides *inter alia* that appeals from nonfinal orders can only be taken to the Court of Appeals by leave of the Appellate Division upon certified questions.

> The petitioner at no time applied to the Appellate Division for such permission. It therefore appears that the Appellate Division, First Judicial Department "was not the last state court in which decision of that [constitutional] question could be had." Gorman v. Washington University, 316 U.S. 98, 100, 62 S.Ct. 962, 963, 83 L.Ed. 1300 (1942). The judgment of the Appellate Division is not that of the "highest court of a State in which a decision could be had" within the meaning of 28 U.S.C. § 1257.

375 U.S. at 80.

The same is true here. Fla.R.App.P. 9.330 provides that a party may request the district court to certify a question to the Florida Supreme Court as one of great public importance. Thus, Hyundai had a right to ask the Third District to do so. Hyundai at no time applied to the Third District for such certification. As in *Gotthilf*, "[i]t therefore appears that the [Third District Court of Appeal] 'was not the last state court in which decision of that [federal preemption] question could be had.'"

In *Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967), this Court reached a different conclusion because, at that time, Florida's appellate rules did not allow *a party* to request certification. 389 U.S. at 237 n.1. Because the rules made no provision for a party to request certification, a party's "suggestion" that certification might be appropriate was a legal nullity. *Id.*

However, Florida's appellate rules have been changed since *Nash* was decided. Those rules now specifically allow a party to ask the district court to certify an issue to the Florida Supreme Court. *Compare* former Fla.R.App.P. 3.14 (1973)(authorizing motions for rehearing) *with* current Fla.R.App.P. 9.330 (replacing rule 3.14 and authorizing motion for certification). *See generally In re The Fla. Bar Rules of App. Pro.*, 529 So.2d at 687 (Rule 9.330(a) and (b) "have been amended to allow a party to move for certification of a question to the Florida Supreme Court based on . . . question of great public importance, without

also having to file a separate motion for rehearing"). Because of the rule change, Florida's present procedure for seeking review by certification to the Florida Supreme Court is like the New York procedure which this Court confronted in *Gotthilf*, rather than the one it confronted in *Nash*. The holding in *Gotthilf*, not *Nash*, controls. This Court has no jurisdiction to review this state court judgment.

STATEMENT OF THE CASE AND FACTS[2/]

Introduction. According to Hyundai, plaintiff claimed Hyundai's seat belt system "was defective because it was equipped with that [sic] 2-point belt system, and not the 3-point belt system plaintiff preferred." Hyundai's Petition at 2. From this premise, Hyundai argues that this case is worthy of review because it is like the pre-*Cipollone* "air bag cases," which held that liability based on a manufacturer's decision to install air bags instead of seat belts was preempted, or the decision in *Myrick*, which held that, after *Cipollone*, liability based on a manufacturer's decision to install regular brakes instead of air brakes was not preempted.

The fact is that Hyundai's characterization of this case, designed to make it appear worthy of review, is wrong. Hyundai was found liable by a state court jury for defectively designing its two-point system, not for choosing to install one federally approved option instead of another federally approved option, i.e., a two-point restraint system instead of a three-point system.

2/ Plaintiff/Respondent Evelyn Phillip, as Personal Representative of the Estate of Ann Marie Phillip, will be referred to as she stands in this Court, as she stood in the trial court and as Phillip. Decedent Ann Marie Phillip will be referred to as "Ann Marie." Defendants/Petitioners Hyundai Motor Company (Korea), Hyundai Motor America ("Hyundai") and Central Hyundai Company, d/b/a Central Hyundai ("Central Hyundai") will be referred to as they stand in this Court, as they stood in the trial court and by name where appropriate.

"R" refers to the state court record on appeal; "T" refers to the trial transcript; "SR" refers to the supplemental record filed with the Third District Court of Appeal. Emphasis is supplied by counsel unless otherwise noted.

The long list of cases cited by Hyundai stand for the proposition that a car manufacturer cannot be held liable merely for choosing one of the general restraint system options allowed by the federal government over another. They do not stand for the proposition that Hyundai may defectively design its chosen option and then escape common law liability. Hyundai, not the federal government, designed Hyundai's two-point system. Thus, Hyundai's liability for Anne Marie's death caused by that defective design is not within the scope of this Court's review in *Myrick* or the cases on preemption cited by Hyundai. To understand this conclusion, a discussion of the facts and evidence is necessary.

Statement of the case. Ann Marie was involved in a routine two-car accident while driving a 1988 Hyundai Excel. Her liver was cut in half by Hyundai's unusual two-point system and she bled to death. By interrogatory verdict, the jury found both that Hyundai's restraint system was defective and that Hyundai and Central Hyundai negligently failed to warn Ann Marie of the dangers of that system even though it had other Hyundai Excel's on its lot with safer restraint systems. Hyundai and Central Hyundai appealed. On appeal, they ignored the jury's findings of both defect and failure to warn. They only challenged the trial court's denial of their pretrial motion for summary judgment based on preemption.[3/] The Third District Court of Appeal

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3/ That summary judgment motion was supported by an affidavit which stated that federal law gave a manufacturer different options for passenger restraint systems; the Excel involved in this case used one of those options--an automatic shoulder belt with no lap belt; and that Hyundai's implementation of that option met the minimum crash test criteria of Federal Motor Vehicle Safety Standard [FMVSS] 208. (R. 247-50). Hyundai's affidavit did *not* say the restraint system was reasonably safe and free of any defect--it did not address defectiveness at all. And, it failed to mention the failure to warn theory at all. Under Florida law, a summary judgment motion which does not address all issues is properly denied. *Zeigler v. Hawkins*, 315 So.2d 200 (Fla. 1st DCA 1975); *Lake v. Konstantinu*, 189 So.2d 171 (Fla. 2d DCA 1966); *Strohm v. Winn-Dixie Stores, Inc.*, 174 So.2d 441 (Fla. 2d DCA 1965).

In opposition, Phillip relied on the deposition of her expert. He said Hyundai's (continued...)

affirmed. It held that Phillip's products liability claims, i.e., that the restraint system in the 1988 Excel was defectively designed and that Central Hyundai failed to warn, were not preempted by the National Highway Traffic Safety Act [the Act].

The accident. Ann Marie bought a 1988 Excel from Central Hyundai in January 1989. (T. 274; 723-24). It had no lap belt, only an automatic shoulder belt which was very stiff or rigid. (T. 443). Hyundai relied on the seat and padding on the lower dashboard to provide the lower body restraint other systems and manufacturers provided with a lap belt. (T. 419-21).

Seven months later, Ann Marie was driving her 1988 Excel. (T. 273, 305-06). She struck an oncoming 1989 Toyota Corolla. (T. 869, 889-90). Both cars were going about 35 m.p.h. (T. 806). There was nothing unusual about this accident, as even Hyundai's expert admitted. (T. 915, 916).

Ann Marie and her front seat passenger wore shoulder belts. The Toyota's driver and front seat passenger wore lap and shoulder belts. None of the rear passengers in either car wore seat belts. Everyone walked away without life-threatening injuries--except Ann Marie.[4/] (T. 506, 928, 932-33, 941). She died from injuries inflicted by her shoulder belt. (T. 1021, 1469).

Emergency surgery revealed that Ann Marie's liver was essentially torn in two; the left lobe was split off from the right.

3/ (...continued)
restraint system was defectively designed. Its overly stiff shoulder belt, combined with its web clamp and lack of pelvic restraint, placed unreasonably high loads on the body's organs and rendered it defective. (SR. 73-78, 85-87, 94-100). Indeed, all persons in a crash like this one should survive if the restraint system is properly designed. (SR. 113).

The trial court denied Hyundai and Central Hyundai's motion for summary judgment. (R. 316). The case was then tried for nine days. Hyundai and Central Hyundai both lost. (T. 1611).

4/ This evidence is in clear contradistinction to Hyundai's statement to this Court at 5 that "Ann Marie was killed in a severe car accident."

The vena cava, the principal vein in the body, was torn; the left hepatic vein was severed. More than four quarts of blood pooled in Ann Marie's abdomen. The surgeons could not save her. (T. 633). She bled to death. (T. 1469).

The autopsy report noted that the liver laceration was due to "blunt force" injury to the abdomen as a result of a car accident. (T. 636). Phillip's expert, an engineer and physician, explained the "blunt force" which killed Anne Marie was the shoulder harness she was wearing: "[T]he blunt force was caused by the diagonal shoulder belt that loaded the left lobe of the liver." (T. 637). The homicide report concurred: Ann Marie's injuries were inflicted *by the shoulder belt.*[5/] (T. 1021, 1469).

Restraint system design. A review of the facts in this case shows that Hyundai's liability, as found by the jury, was based on the defective design of its restraint system, not on its decision to use a two-point system instead of a three-point system.

The first task in designing a restraint system is to restrain the pelvis. (T. 630). Without adequate pelvic restraint, the body slides up, down or sideways; this changes the shoulder belt's position over the torso and shoulder. (T. 424). The belt can slip off the shoulder and chest. If it does, then the 2,000 pounds of force generated in a 30 m.p.h. collision no longer load on the body's strong bones. (T. 448, 630). Rather, the shifted belt can load on the lower ribs; these compress easily because they are not attached to the sternum. Or, it can load on the liver, spleen or bowel, which are unprotected by the ribs; this can rupture or lacerate these organs. (T. 631). From the early 1980's, General Motors warned that using a shoulder belt without adequate pelvic restraint was dangerous. (T. 1252, 1333-34).

The first restraint systems used a lap belt to accomplish the

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5/ Hyundai informs this Court at 7 that the coroner testified that Ann Marie's injuries were caused by the accident forces, not the shoulder belt. Hyundai simply ignores the contrary evidence, including that of the neutral police officer in his homicide report. It also ignores the jury verdict which rejected Hyundai's evidence.

necessary pelvic restraint. See (T. 630). In the 1970's, shoulder belts were added. These direct the load through the strong shoulder, down the very strong spine, to the very strong pelvis. (T. 630). However, if a shoulder belt is too stiff, inertial injuries occur.[6/] If the belt restrains the chest too quickly, the body does not have enough time to absorb the energy. (T. 1094). The system must be designed to prevent the chest and abdomen from slamming into a rigid shoulder strap. (T. 967, 1299-1300).

Another risk of a shifting shoulder belt is "roping"--the edge of the belt curls on itself. (T. 571). As it curls, it may dig into flesh and organs beneath. The rigid chest keeps the belt flat. However, the edge can curl in on the soft abdomen and cut the liver or other unprotected organs. (T. 571, 691). Roping increases the chance and severity of injury. (T. 571, 585).

The liver and spleen "are the most vulnerable organs in the body for belt loading." (T. 632). Part of the left lobe of the liver is totally unprotected; the right lobe is only protected by the less sturdy part of the lower ribs. (T. 631). This vulnerability is why it is so important that the shoulder belt not shift and exert too much pressure in the soft abdominal area. See (T. 632). Even Hyundai's experts agreed that a restraint system which loaded on the abdomen during an accident was a dangerous one. (T. 1031, 1303-04). See (T. 362).

The federal government requires restraint systems to meet minimum performance standards. Federal Motor Vehicle Safety Standard [FMVSS] 208 sets restraint system performance standards in three areas: the head, chest and femur. (T. 376, 1141, 1295-98). It does not establish standards for every aspect of a restraint system's performance. Significantly, it does not estab-

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6/ Inertia is the tendency of a body to continue in motion unless disturbed by an external force. In a 30 m.p.h. collision, the chest organs move ahead at 30 m.p.h. until halted by the chest wall and restraint system. (T. 967, 1299).

lish any standards for impact to the abdomen. (T. 377, 692).[7/]

The Excel's restraint system. The 1988 Excel restraint system had an automatic shoulder harness, but no lap belt. Phillip's engineering expert found the Excel's system defective and unreasonably dangerous. (T. 412). It posed an unreasonable risk of injury or death in collisions at normal speeds. (T. 412). Ann Marie's injuries were caused by three aspects of the Excel's restraint system design: (1) the lack of adequate pelvic restraint; (2) a too-rigid shoulder belt; and (3) a web clamp which made the belt system too "aggressive." (T. 443-44).

Hyundai attempted to control the pelvis with a knee bolster (a padded area on the lower dashboard) and a slightly angled seat reinforced with steel to prevent the occupant's buttocks from plowing through the bottom. (T. 419-21, 533, 538). It directed the restraint load for the lower body to the femur rather than the pelvis. (T. 1095). The system allowed too much lower body movement. The knee bolster let the hips slide forward until the knee hit the bolster. (T. 423, 434, 641-42). Even then, the pelvis continued to move forward. (T. 643).

Because the occupants of a car involved in an accident are thrown in the direction of the impact, the knee bolster system allows even greater lower body movement when, as here, the accident is not a head-on collision. (T. 640). Here, Ann Marie's knees moved 45° to 60° right; they had farther to go before hitting the knee bolster than if moving straight ahead. (T. 640, 642). This allowed the shoulder belt to shift from loading safely to the shoulder and spine to loading directly on the abdo-

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7/ FMVSS 208 sets minimum standards. Reasonable engineering standards may require more. (T. 446, 560). A system with a belt that stretches from one side of the car to the other might meet FMVSS 208's standards; it might also strangle the user. (T. 448, 524). Even Thomas, Hyundai's engineering expert, admitted that FMVSS 208 does not give the whole picture. He has seen crash tests where all of FMVSS 208's performance standards were met but the dummy flew through the windshield. (T. 1302). Thus, even he acknowledged that meeting FMVSS 208's performance standards is the start, not the end, in designing a reasonably safe occupant restraint system. (T. 560).

men and liver area. (T. 436, 635, 642-43).

Another expert explained the effect of Hyundai's restraint system on Ann Marie. After the collision, Ann Marie's pelvis began moving off the seat, forward and to the right. (T. 641). The shoulder belt shifted; it tried to restrain her by loading over her lower rib cage. (T. 642). This did not restrain her pelvis, which continued to move. (T. 643). Her knees had a long way to travel before hitting the bolster because she was moving obliquely right. Even when her knees hit the bolster, her pelvis kept moving forward and right, along with her spine and right lobe of the liver. (T. 642, 643). Simultaneously, the shoulder belt continued to compress the liver's left lobe. (T. 643). It was probably roping moderately. (T. 691-92). As the torso continued to move to the right, the force applied by the belt opened up the liver. In the process, it tore off the liver's left hepatic vein and ruptured the inferior vena cava. (T. 643).

In addition to inadequate pelvic restraint, Phillip's expert identified a second defect in the restraint system: the shoulder harness itself. Hyundai suggested it simply "borrowed" an already proven system designed by Volkswagen.[8/] It ignored the differences between the systems. Hyundai altered the seat and knee bolster. More importantly, the stiffer shoulder strap and use of a "web clamp" made Hyundai's system dangerously different. See (T. 1098-99).

Shoulder belts are designed to stretch when fully loaded in an accident; the greater the stretch, the longer the body has to absorb the energy. (T. 823-34, 1094). The 1988 Excel's shoulder harness was rigid--"just in and of itself there is not enough energy absorption in the shoulder harness, it is very stiff." (T. 443). It stretched too little--only 4.5%. (T. 444, 577). By

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8/ Volkswagen originally developed this "no lap belt" system in the 1970's and used it in the 1975 Rabbit. (T. 364, 1074, 1153). However, the 1988 Excel system was not a faithful copy of Volkswagen's two-point system, which it allegedly copied. See (T. 444). The knee bolster, seat and shoulder harness were all different. (T. 1098-99).

contrast, Volkswagen's two-point "shoulder belt-only" system which Hyundai "copied" stretched 20%. (T. 444).

Hyundai also used a web clamp. The shoulder belt pulls out of a retractor. The web clamp is a device in the retractor that locks the belt in an accident and prevents the release of excess webbing. (T. 444, 528-32). Volkswagen did not use one in its "shoulder belt-only" system. (T. 1098). A web clamp may be fine with a belt that stretches more than Hyundai's. (T. 581). But Hyundai's combination of a belt with a low stretch factor and a web clamp "makes it a very aggressive belt." (T. 579). Very simply, the web clamp accentuated the problems caused by the rigid shoulder belt. See (T. 581).

The expert analyzed films of Hyundai's crash tests. (T. 432). They show Hyundai's shoulder harness did not work well with the knee bolster. The shoulder belt on the dummy acted as it had on Ann Marie. The dummy's hips moved forward and the shoulder belt took all the load. It slipped under the rib cage and into the abdomen. The sequence of photos shows the shoulder strap pressing progressively further into the abdomen, with the load primarily underneath the rib cage and around the dummy's side. (T. 436-37). This means the shoulder belt loaded over the driver's liver. (T. 437). The films show at least moderate roping in this area. (T. 436). All this could be seen by someone experienced in film analysis, crash tests and restraint systems, but Hyundai's engineers saw none of it.[9/] (T. 432-33, 585).

Significantly, the federal regulations on which Hyundai relies for preemption merely said that Hyundai could use a two-point

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9/ One explanation for Hyundai's use of such a dangerous system was lack of experience. Crash testing and evaluating automobile restraint systems and their effect on people is the province of biomechanical engineering. (T. 624-25). Hyundai employed *no* biomechanical engineers when it designed and tested the 1988 Excel. (T. 330, 345, 624). The engineer in charge of testing this system had no academic or practical experience. (T. 324). He admitted he "was just a greenhorn, just two years in the company and not in a position to conduct research or investigation" when he was put in charge of the crash testing. (T. 387).

system. Those regulations did not tell Hyundai how to safely design that design. Because proper design was not mandated by the government but left to Hyundai, the jury's decision that Hyundai's design was defective is not only supported by abundant evidence, but is also not preempted.

Failure to warn. Phillip alleged not only that the seatbelt system was defectively designed, but also that Hyundai and Central Hyundai failed to inform Ann Marie about other seatbelt systems which were available in Hyundai's Excels and which had safer seatbelt systems. Significantly, this failure-to-warn claim was grounded in unique facts. When Ann Marie went to Central Hyundai in January 1989 to buy a car, it had various 1988 and 1989 Excels on its lot from which Ann Marie could choose. (T. 723-24, 730). The restraint systems on all the cars were *not* the same. Hyundai had three different restraint systems in its Excels: 1988 models with two-point automatic shoulder belts and no lap belt; 1988 and 1989 models with conventional three-point shoulder and lap belts; and 1989 models with two-point automatic shoulder belts plus a lap belt.

In the 1989 Excels, all of which had a lap belt, the owner's manual and driver's sun visor warned about dangers in not using the manual lap belt. Hyundai's visor clearly stated:

IMPORTANT SAFETY INFORMATION:

> For full restraint protection, THE MANUAL LAP BELT AND THE AUTOMATIC SHOULDER BELT MUST BE SECURELY FASTENED whenever the car is moving.

(T. 592, 1240; Pl.Ex. 28). Hyundai's visor also noted: "Failure to follow these instructions could increase the chance and/or severity of injury in an accident." *Id.*

Thus, when Ann Marie bought her Excel, Central Hyundai knew the pelvic restraint offered by its seat/knee bolster was inadequate. It knew that restraint systems with a lap belt--available in some 1988 and 1989 Excels--were safer than the shoulder belt-only system in the 1988 Excel Ann Marie purchased. But

Central Hyundai never passed this information on to Ann Marie. Because Central Hyundai did not tell Ann Marie of the restraint system differences between the various 1988 and 1989 Excel models, Ann Marie had no opportunity to make an educated decision as to which car and which restraint system she wanted.

The jury properly found liability based on this failure to warn. Because the federal regulations do not address the issue of warnings at all, this liability, like Hyundai's liability for defective design, is not preempted.

WHY CERTIORARI SHOULD NOT BE GRANTED

Summary of Argument. In its attempt to gain certiorari review by this Court, Hyundai has mischaracterized the claims against it. Hyundai suggests that certiorari is appropriate because this case involves preemption under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 *et seq.* [the Act], and the administrative regulations promulgated thereunder [FMVSS]. Hyundai notes that this Court accepted jurisdiction in *Freightliner Corp. v. Myrick*, Case No. 94-286 (Oct. 7, 1994), to consider the preemptive scope of the Act, and suggests *Myrick* will be dispositive here. Hyundai also suggests that, regardless of *Myrick*, this Court should review this case because FMVSS 208 and the Act immunize it from tort liability for utilizing a defective two-point restraint system. Neither suggestion is accurate. Regardless of whether the Act expressly or impliedly preempts conflicting tort claims, Hyundai's liability here does not conflict with FMVSS 208 and therefore is not preempted.

To create its preemption argument, Hyundai asserts at 5 that it was found liable because its vehicle "was defective because it was equipped with that [sic] 2-point belt system, and not the 3-point belt system plaintiff preferred." Hyundai is wrong. Hyundai was found liable for defectively designing its two-point system, not for choosing to install one federally approved option instead of another federally approved option, i.e., a two-point restraint system instead of a three-point system.

While some cases hold that a car manufacturer cannot be

liable for choosing one type of federally approved restraint option instead of another (i.e., airbags instead of belts; regular brakes instead of anti-lock brakes), neither the federal regulations nor the cases construing them allow a manufacturer to defectively design the restraint option chosen. Hyundai, not the federal government, designed Hyundai's particular two-point system. Although the federal regulations allowed Hyundai to use a two-point system, they did not tell Hyundai how to design it. The regulations do not specify the degree of rigidity of the shoulder belt or its other characteristics; they do not mandate the use of web clamps; they do not specify the existence or degree of seat ramping; they do not specify the existence, placement, or characteristics of a knee bolster.

Here, Hyundai was found liable, not for using a two-point system, but for designing a defective one. The two-point system Hyundai used was defective--the shoulder belt was too stiff, a web clamp was inappropriate and the pelvic restraint was inadequate. As a result, the system allowed too much roping and placed too great a load on the abdomen. Thus, there is no preemption because the issue before the jury in this case--whether Hyundai properly designed its two-point system--is outside the scope of the federal regulations.

Moreover, *Myrick* does not address the defective design of a permissible option; it involves the issue of liability based solely on the use of one federally approved option (regular brakes) instead of another (anti-lock brakes). Thus, this Court's decision in *Myrick* will not determine Hyundai's liability here.

Finally, preemption must be applied on a claim by claim basis. Here, Phillip claimed both failure to warn and design defect. Under the unique facts of this case, a jury could easily conclude Central Hyundai had a duty to inform Ann Marie about the choices in restraint system options and about the availability of Hyundai Excels on the very same lot with better restraint systems. Because the federal regulations do not address the issue of warnings at all, there is no conflict and therefore no preemption.

In sum, even if this Court were to hold that FMVSS 208

allows auto manufacturers the freedom to choose a two-point system, that holding would not address the issue here. It would not insulate Hyundai from liability for designing the defective restraint system involved in this case.

The Act. Hyundai bases its preemption claim on the Act. The Act contains a limited preemption provision:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or such item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). This preemption clause does not stand alone. It is molded both by the Act's purpose and by a savings clause that protects common law causes of action against the manufacturer from preemption. Both apply here.

The clear purpose of the Act was to increase the safety of automobile occupants in car accidents. That purpose was clearly expressed by Congress within the confines of the Act itself. The Act's opening section states:

> Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents.

15 U.S.C. § 1381. This Court has acknowledged that this is the Act's true purpose. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 32-33 (1983).

To achieve this goal, the Act authorized the administrative promulgation of safety standards. These standards do *not* replace common law standards of care. Section 1397(k)(formerly § 1397(c)) unequivocally provides:

> Compliance with any Federal Motor Vehicle Safety Standard issued under this Chapter *does not exempt any person from any liability under common law.*

The legislative history makes the same point. The Senate report addressed the Act's effect on state law. It concluded:

> Moreover, the Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards *would thus not necessarily shield any person from product liability at common law.*

S. Rep. No. 1301, 89th Cong., 2d Sess. at 2710 (1966). The House report also notes the savings clause is intended to ensure

> [t]hat compliance with safety standards *is not to be a defense or otherwise to effect the rights of parties under common law*, particularly those relating to warranty, contract and tort liability.

H.R. Rep. No. 1776, 89th Cong., 2d Sess. at 24 (1966).[10/]

> [T]hese expressions of legislative purpose should govern our assessment of the preemptive effect of the Act and the standards issued under it.

Chrysler Corp. v. Tofany, 419 F.2d 499, 508 (2d Cir. 1969). In

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10/ Courts consistently reject the auto industry's assertion that the Act's real purpose is uniform regulation, not safety. "[Uniformity] is a goal only insofar as it promotes safety. Uniformity is not a goal in and of itself; nor is uniformity a goal of the Safety Act so that vehicle equipment manufacturers might avoid tort liability." *Welsh v. Century Products*, 745 F.Supp. 313, 319 (D.Md. 1990). *See also Garrett v. Ford Motor Co.*, 684 F.Supp. 407, 409 (D.Md. 1987)("Congress intended the Act to save the lives of automobile passengers through safety standards; not the dollars of automobile manufacturers through uniformity"); *Gingold v. Audi-NSU-Auto Union*, 567 A.2d 312, 329-30 (Pa.Super.Ct. 1989). Uniformity cannot "take precedence over Congress' primary goal of safety." *Buzzard v. Roadrunner Trucking Co.*, 966 F.2d 777, 783 (3d Cir. 1992)("strict uniformity may even interfere with the safety goal, thus frustrating the Act's purpose").

other words, the federal motor vehicle safety standards are *minimum* standards. They set a floor for automotive safety, not a ceiling. By their very terms, compliance does not relieve the manufacturer of common law liability. *Sours v. General Motors Corp.*, 717 F.2d 1511 (6th Cir. 1983).

Hyundai claims that FMVSS 208 is an exception to these rules because it allows a manufacturer to choose among three different types of systems. Even if FMVSS 208 allows a manufacturer to choose any of the general alternatives listed there without being subjected to tort liability, that exception does not apply here. Hyundai is not liable because it chose one alternative over another; Hyundai is liable because it defectively designed its two-point system. Any exception for FMVSS 208 which Hyundai suggests exists simply does not encompass this action.

A. FMVSS 208 does not authorize defective design of a restraint system.

Introduction. A jury found that Hyundai's restraint system was defectively designed. Hyundai did not challenge the sufficiency of the evidence to support that factual finding in its appeal. Thus, the simple legal issue which was before the Third District and which is before this Court is whether the Act and FMVSS 208 allow Hyundai to design and install an admittedly defective and unreasonably dangerous two-point restraint system and then hide behind the fact that two-point systems are generally authorized. That issue was properly decided adversely to Hyundai; it does not merit further review here.

FMVSS 208. FMVSS 208 authorizes a manufacturer to use either an automatic two-point system, an automatic three-point system or airbags. Congress and its regulatory agencies did not try to design or approve all such systems. To the contrary, the government allowed manufacturers to choose between these general types of systems and relied on the manufacturers to design them safely. With respect to design, the government merely set minimum safety standards that each option must meet. The safety standards for restraint systems involve the head, chest and femur. There is no safety standard for abdominal loading.

Importantly, Congress specifically stated that compliance with these minimum safety standards *does not* insulate a manufacturer from common law liability. Even if some actions are preempted, claims based on an authorized option's defective design are not. Simply put, the federal standards do not shield a manufacturer from liability when it uses a defective two-point system, a defective three-point system or a defective airbag system.

Hyundai installed a defectively designed restraint system in the 1988 Excel which caused Ann Marie's injury rather than prevented it. Phillip's experts identified three defects: (1) inadequate pelvic restraint; (2) a too-stiff shoulder harness; and (3) a web clamp which made the system too "aggressive." The restraint system consisted of a single shoulder strap which, together with the knee bolster, did not adequately confine the pelvis. The shoulder belt was stiff; a web clamp made it more rigid. Because the pelvis was unconfined, the shoulder belt could load 2,000 pounds of force on the abdomen in a collision.

Hyundai cites numerous cases in support of its preemption claim. Almost all relate to the issue of whether a manufacturer may be held liable solely because it failed to install airbags. They recognize that Congress allowed options in lieu of mandatory airbags; liability predicated only on a manufacturer's exercise of the very choice Congress granted would be improper.[11/]

These "airbag" cases do not apply here. Phillip does not claim that Hyundai should have chosen airbags, or some other authorized system, as its safety restraint option. Instead, she claimed that once Hyundai chose a "shoulder belt-only" system, it had a duty to design a system that was not unreasonably dangerous to the user. Under § 1397(k), that duty is enforceable in

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11/ In the typical airbag case, the plaintiff was not wearing his seatbelt. Thus, he could not claim the seatbelt system was defective. He could only claim the manufacturer should have used an automatic system like an airbag. Courts hold such claims are preempted because federal law allows seatbelts instead of airbags and states cannot eliminate a choice expressly allowed by federal law.

a common law action.

Hyundai blurs the difference between these two liability theories. However, the distinction is critical. In one, a plaintiff attempts to hold a manufacturer liable for choosing one general type of restraint system authorized by FMVSS 208 over another authorized system. In the other, a plaintiff attempts to hold a manufacturer liable for defectively designing the particular type of restraint system chosen. Both *Myrick* and Hyundai address the first situation; they do not address the second.[12/] Yet, the second situation is the issue in this case.

The distinction between liability based on choosing an approved system and liability based on improper design of that system is not novel or particularly controversial. *Wood v. Gen. Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), and *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990), are airbag cases which found preemption. However, both recognized that preemption does not encompass defective design of an approved option. *Wood* discussed § 1392(d), the "preemption" clause:

> We, of course, do not imply that section 1392(d)'s prohibition immunizes the manufacturer from liability for *defective design of an airbag*.

865 F.2d at 402 n.10.

Perry v. Mercedes Benz, 957 F.2d 1257 (5th Cir. 1992), is on point. Perry drove her car into a ditch. Her airbag did not inflate on impact. She claimed the airbag was defectively designed because the force required to trigger its deployment was too high. The restraint system Mercedes Benz used--airbags--was one of the general types approved by FMVSS 208. The system also met the government's minimum safety standards. As a

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12/ Hyundai cites a few cases which consider whether the failure to install a lap belt, in itself, is a design defect. They utilize the same reasoning as the "no airbag" cases and hold that the mere failure to install a lap belt is not an actionable design defect. They *do not* suggest that a manufacturer may defectively design that "no lap belt" system.

result, Mercedes Benz argued, like Hyundai here, that Perry's claim was preempted. The Fifth Circuit disagreed.

The court analyzed the "no-airbag" cases, the same cases on which Hyundai relies. It acknowledged that some courts have found preemption in such cases because

> the tort claims sought to impose liability on the manufacturer for choosing an option that the federal scheme expressly granted them the right to choose.

957 F.2d at 1264. However, *Perry* concluded that these were not controlling; the issue was not the same. The issue in *Perry* was the manufacturer's defective design of the chosen system and not the decision to install one type of system rather than another. As *Perry* recognized, common law liability is, at best, preempted only when the claim is based *solely* on the manufacturer's choice of one alternative allowed by FMVSS 208 over another; preemption is *not* a factor when the claim is based on the manufacturer's defective design of the alternative it has chosen.

Specifically, *Perry* found no preemption of a claim that the chosen restraint system was defectively designed because

> [l]iability for the defective design of an air bag system would not necessarily conflict with the objectives of the Safety Act or the methods that have been chosen to fulfill those objectives.

957 F.2d at 1265. *Perry* then concluded:

> [E]ven if we assume that allowing liability for a manufacturer's failure to install an air bag would conflict with Congress' chosen method by removing or requiring one of the manufacturer's choices, Perry's claim presents a different scenario. Once the manufacturer chooses an option that includes an airbag system, Standard 208 S5-S6 merely set forth *minimum* performance requirements for that system. *To allow tort liability for the design of that system would not remove or require any particular choice,*

> *or otherwise frustrate the "flexibility" that the federal scheme provides*. We recognize that the manufacturer who chooses to meet only the bare minimum performance requirements will be burdened with the potential for tort liability, but this is the exact burden that Congress preserved in the Savings Clause, when it stated that "[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law."

Id. (footnote omitted; emphasis by court).

The same is true here. Once Hyundai chose the option of a shoulder belt without a lap belt, the regulations merely set forth *minimum* performance requirements for that system.[13/] To allow tort liability for the design of that system does not remove one of the federally approved options. It merely holds Hyundai responsible for its defective implementation of the option it chose. Preemption is simply not a factor in this situation.

Hyundai nowhere suggests that *Perry* was wrongly decided.[14/] Indeed, Hyundai ignores the fact that the Third District relied on *Perry*, not just *Myrick*, to support its holding that the Act did not preempt Phillip's common law claims. This selective blindness, however, does not change the fact that *Perry* distinguishes between preemption for simply choosing an allowed option and no preemption for defective design of that option. Indeed, that was the only point for which Phillip cited *Perry* in

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13/ The cases cited by Hyundai do not suggest that a car manufacturer is insulated from liability simply because its system meets the minimum standards for head, chest and femur loads; nor do they do not hold that, because the minimum standards only address head, chest and femur loads, Hyundai had no duty to design its system to provide for safe abdomen loads.

14/ Hyundai's sole reference to *Perry* is in a footnote where it makes the cursory claim that *Perry* is "an off-point case." Hyundai's Petition at 7 n.5. It may be "off-point" for Hyundai's purposes. However, it is directly "on-point" to the facts and liability theories at issue here.

her Third District brief. The Third District's citation to *Perry* recognizes this distinction and implicitly holds that Phillip's claims fall on the "no preemption" side.

The distinction drawn by the Fifth Circuit in *Perry*, and acknowledged by the First Circuit in *Wood* and the Third Circuit in *Pokorny*, is common sense. Suppose Hyundai designed a lap belt with knife-sharp edges which cut into the user during an accident. Obviously, Hyundai would not be insulated from liability simply because the manual belt was part of a restraint system whose general type was acceptable and which met minimum performance standards for head, chest and femur compression. Or, suppose that Hyundai designed an airbag which clung to the user's face on deployment and smothered him. Hyundai would not be insulated from liability simply because an airbag is an acceptable type of system. Yet, that is exactly what Hyundai argues here. It claims it may design a restraint system, which can itself kill the user, and elude liability simply because the system is of a type generally approved under FMVSS 208 and meets minimum head, chest and femur force standards.

FMVSS 208 allows a manufacturer to choose a two-point system; it does not mandate any particular two-point system. It certainly does not set out the design details of that system. Although FMVSS 208 may immunize a manufacturer from state tort liability for simply choosing to use a non-defective two-point system, it does not immunize a manufacturer from state tort liability for designing a defective one.

The Myrick case. The Third District cited *Myrick v. Fruehauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), to support its holding that Phillip's claims against Hyundai were not preempted. This Court has accepted jurisdiction to review *Myrick*. From this, Hyundai concludes that this Court's decision in *Myrick* will be controlling here. Hyundai's argument is misguided. *Myrick* does not address defective design of an approved system. Thus, regardless of how this Court decides *Myrick*, this

action will not be affected.[15/]

Myrick is factually similar to the airbag cases. In *Myrick*, the defendants are two truck manufacturers who did not install anti-lock brakes on their trucks. The applicable federal safety standard allowed truck manufacturers to choose whether to install anti-lock brakes or to use regular brakes instead; the defendants chose not to install anti-lock brakes.

In other words, the issue in *Myrick*, like the airbag cases, is whether the Act preempts common law actions based solely on the manufacturers' choice of an equipment option which is specifically allowed by federal safety standards. Even if this Court decides that the Act preempts such liability, that decision would not address the issue here. Hyundai is not liable because it chose a two-point system; Hyundai is liable because it designed and installed a fatally defective two-point system. Hyundai's reliance on *Myrick* is fueled by Hyundai's consistent disregard of the difference between liability for choosing one of several authorized options, which may be preempted, and liability for the defective implementation of that choice, which is not.

In sum, Hyundai chose to install a system without a lap belt. Although that choice was permissible under the federal standards, Hyundai still had a common law duty to design its system so as to safely implement that choice. It had a duty not to design a system where, because of lack of adequate pelvic restraint, the shoulder belt could shift and load 2,000 pounds of collision force onto the user's abdomen and liver. It had a duty to design a shoulder belt which was not so extraordinarily stiff as to cause its

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15/ The Third District's citation to *Myrick* as well as to *Perry* indicates that it had alternative independent bases for its holding that the claims against Hyundai were not preempted. The citation to *Myrick* suggests that it agreed that, under the rationale of *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), the Act did not impliedly preempt the claims. Its citation to *Perry* indicates that it also agreed that claims based on the defective design of an authorized option were not preempted. Because Hyundai does not attack the *Perry* alternative, a decision in *Myrick*, even if contrary to the Eleventh Circuit's decision, will not insulate Hyundai from liability.

user fatal injuries in a collision. It had a duty not to use a web clamp which accentuated the injury producing potential of the shoulder belt. In short, it had a duty to design a shoulder belt-only system whose parts functioned together to protect, not kill, the user. Its failure to do so subjects it to liability. That liability is not preempted by the Act.

B. FMVSS 208 does not regulate the aspect of performance at issue here.

Hyundai's preemption argument is inapplicable to this case for another reason as well. The federal regulations do not address abdominal loading; a defect relating to abdominal loading is therefore not preempted.

Hyundai relies on the following language in the Act:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or such item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). Thus, by its own terms, the Act only preempts a conflicting state safety standard if two conditions are met. First, the state standard must apply to the same "item of motor vehicle equipment" as the federal standard. Second, the state standard established for that item of equipment must apply "to the same aspect of performance" as the federal standard. *See Chrysler Corp. v. Tofany*, 419 F.2d 499, 506 (2d Cir. 1969). Both requirements must be met.

The "aspect of performance" at issue in this lawsuit is abdominal loading. Ann Marie died because Hyundai's restraint system allowed the force from the collision to be transmitted to and exerted against the abdomen instead of the shoulder, spine or pelvis. But, FMVSS 208 only sets safety standards for three

aspects of a restraint system's performance: the forces which may be placed on the head, chest and femur during a certain type of crash test. FMVSS 208 does not regulate performance vis-a-vis abdominal forces; it is silent on that matter. Even Hyundai admitted there was no federal standard for this aspect of its restraint system's performance. (T. 349, 363, 377).

If there is no federal standard on a particular aspect of performance, there is no preemption under 15 U.S.C. § 1392(d). Hyundai cannot rely on federal standards which are silent as to an aspect of performance to preclude liability. Any other conclusion ignores the plain terms of the statute.

Interpretation of a statute must begin with its language. "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Moreover, "only the most extraordinary showing of contrary intentions" of congressional intent "would justify a limitation on the 'plain meaning' of the statutory language." *Garcia v. United States*, 469 U.S. 70, 75 (1984)(citations omitted). When the terms of a statute are unambiguous, "judicial inquiry is complete, except in rare and exceptional circumstances." *Id.* at 75 (citations omitted).

The language in § 1392(d) on the scope of preemption vis-a-vis aspect of performance is unambiguous. It must be given effect according to its plain meaning. Consequently, this action is not preempted because it does not involve the same aspect of performance which is addressed by the federal safety standards.

Other rules of statutory construction lead to the same result. The lower courts have consistently held that the phrase "same aspect of performance" should be narrowly read to promote the purposes of the Act. *Pokorny*, 902 F.2d at 1126; *Wood*, 865 F.2d at 418; *Tofany*, 419 F.2d at 510; *Jordan v. Paccar, Inc.*, 792 F.Supp. 545, 550 (N.D.Ohio 1992). A broad reading is inconsistent with the Act's purpose and savings clause. *See Tofany*, 419 F.2d at 509-10; *Jordan*, 792 F.Supp. at 550.

A broad reading is also inconsistent with general preemption principles announced by this Court. The starting place for preemption analysis is the precept that federal preemption is not favored. *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2617-18 (1992). Courts start "with the assumption that the historic police powers of the States are not to be superseded by [a] Federal Act unless that is the clear and manifest purpose of Congress." *Id.* at 2617 (citations, quotation marks and ellipses omitted); *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990). This is especially true when the subject is of traditional state concern, like tort remedies for personal injuries. *See Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947); *Taylor v. Gen. Motors Corp.*, 875 F.2d 816, 823 (11th Cir. 1989); *Gingold v. Audi-NSU-Auto Union, A.G.*, 567 A.2d 312, 318-19 (Pa.Super.Ct. 1989). Application of these principles mandates that preemption provisions should be narrowly construed. *See Cipollone*, 112 S.Ct. at 2618.

Whether viewed as a matter of the plain terms of 15 U.S.C. § 1392(d), or whether viewed as a matter of statutory construction and federalism, the result is the same. Hyundai remains tortiously liable for the defective design of its restraint system vis-a-vis abdominal loading because that aspect of its restraint system's performance is not the subject of a federal standard. Simply put, Hyundai cannot design a restraint system which meets minimum requirements for head, chest and femur loading but which nevertheless causes serious injuries to other parts of the body not covered by any federal standards and then seek to avoid liability under the guise of preemption. Thus, Hyundai's common law liability is not preempted by the Act.

C. At the least, the failure to warn claims against Hyundai and Central Hyundai were not preempted.

Phillip's claims against Hyundai were not limited to design defects. To the contrary, through interrogatory verdict the jury specifically found a negligent failure to warn in addition to defective design. (T. 1611). Hyundai's motion for summary judg-

ment, the denial of which was the only issue it raised on appeal, never addressed this claim; it did *not* argue that the failure to warn claims were preempted. Yet, that claim makes certiorari inappropriate here.

Federal preemption is a scalpel, not a bludgeon. It must be used precisely and narrowly. It requires a claim by claim analysis of the causes of action. The fact that one claim is preempted does not mean that all are. *Cipollone*, 112 S.Ct. at 2621-25. Here, even if the design defect claim is preempted, the failure to warn claim is not.

There are two general ways in which state law claims are preempted. If Congress evidences an intent to occupy the entire field, then state laws within that field are preempted. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). There is no suggestion here that Congress intended to wholly occupy the field of automotive safety to the exclusion of the states. Indeed, the savings clause in 15 U.S.C. § 1397(k) evidences the opposite intent since it saves state common law actions.

State law may also be displaced if the state law actually conflicts with the federal law. This means that a state law may not be enforced if it: (1) is impossible for a manufacturer to comply with both the state and the federal law; or (2) obstructs the achievement of the full purposes and objectives of Congress. *Silkwood*, 464 U.S. at 248. Neither of these reasons for preemption exist here either.

Tnere is no actual conflict between a state tort claim imposing a duty to warn and FMVSS 208. In fact, the Act and FMVSS 208 are completely silent on the issue of warnings. It is not impossible to comply with FMVSS 208 as well as with state law requirements on warnings. As a result, there is no preemption because of actual conflict.

Moreover, imposing a duty to warn does not impede Congress' objectives under the Act. The explicit and announced purpose of Congress in passing the Act was to improve automobile occupant safety. 15 U.S.C. § 1381. Imposing a duty to

warn does not obstruct this goal.

In short, there is no preemption of the duty to warn. FMVSS 208 addresses equipment performance requirements. At best, it preempts state regulations that establish standards "applicable to the same aspect of performance of such vehicle or such items of equipment." Enforcing a duty to warn does not establish contrary standards; neither does it frustrate the Act's purpose. As a result, the state claim is not preempted. *See Richards v. Michelin Tire Corp.*, 786 F.Supp. 959 (S.D.Ala. 1992)(Act does not preempt claim based on duty to warn of tire/rim mismatching).

Hyundai makes no reference in its petition to the failure to warn claims. Hyundai simply fails to address this Court's analysis in *Cipollone* which distinguished between claims based on failure to warn and other claims in the case.

Cipollone involved the Cigarette Labeling and Advertising Act which mandated that specific warnings be put on packs of cigarettes. The Act had a preemption clause which provided that no other warnings shall be required on the package or in advertising. This Court addressed the scope of federal preemption of common law tort claims against the cigarette manufacturer. It held that duty to warn claims based on allegations that the manufacturer should have included additional or clearer warnings were preempted. However, failure to warn claims based on the manufacturer's testing or research practices were *not* preempted. Claims for breach of express warranty, fraudulent misrepresentation and conspiracy also were *not* preempted. Thus, *Cipollone* held that warning claims were preempted only to the extent they fell within the statute. Other claims were not preempted.

In *Cipollone*, the federal legislation addressed warnings and nothing else. Thus, only warning claims were preempted. Claims which were not addressed by the federal legislation were not preempted. Here, the federal legislation does not say anything about warnings. Those claims are not preempted.

There is no conflict between the restraint systems suggested

by FMVSS 208 and imposing a duty to warn a customer that the manufacturer's shoulder and lap belt system is safer than that manufacturer's shoulder belt-only system, or that the same model is available with a lap belt. Moreover, establishing such a duty is not detrimental to the safety goals of the Act. Hyundai and Central Hyundai could easily have met both requirements, with no detriment to the safety of automobile occupants. A duty to warn simply requires Hyundai and Central Hyundai to notify the buyer of her alternatives. Because there is no conflict between this common law duty to warn and FMVSS 208, there is no pre-emption of this claim.

CONCLUSION

This is not a case where Hyundai was found liable for choosing one federally approved option instead of another. To the contrary, the jury specifically found Hyundai liable because it defectively designed the chosen option and because it negligently failed to warn about the availability of its cars with different restraint systems. Thus, although the question Hyundai presents is interesting and perhaps important, it is not a basis for certiorari review in this case. Certiorari should be denied.

Respectfully submitted,

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(3)

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No. 94-867

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HYUNDAI MOTOR COMPANY,
HYUNDAI MOTOR AMERICA and
CENTRAL HYUNDAI COMPANY,
Petitioners,

v.

EVELYN PHILLIP,
as Personal Representative of the
Estate of Ann Marie Phillip, deceased,
Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

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INTRODUCTION

The lower court found no preemption of plaintiff's FMVSS 208 claim based on *Myrick v. Freuhauf, Inc.*, 13 F.3d 1516 (11th Cir. 1993), *cert. granted*, 115 S. Ct. 306 (1994). Petition for Writ of Certiorari ("Pet.") at 7.[1] *Myrick* violates 200 years of precedent, and review of *Phillip* is proper for all the reasons it was proper in *Myrick*. Indeed, another appellate court has just declined to consider implied preemption, based on *Myrick*. *Hernandez-Gomez v. Volkswagen of Am.*, 1994 WL 593202 (Ariz. Nov. 1, 1994).

Plaintiff does not defend *Myrick*'s ban on implied preemption analysis. And she concedes that "Congress allowed options in lieu of mandatory airbags;[2] liability predicated only on a manufacturer's exercise of the very choice Congress granted would be improper." Opp. at 19. But she tries to avoid preemption here, urging a procedural bar that does not exist and recasting her claim in ways belied by the record.

Plaintiff's claim directly conflicted with, and took away, an FMVSS 208 option that NHTSA found necessary to serve safety. The lower court relied on *Myrick* in finding no preemption despite that direct conflict. The Court should grant review here, just as it did in *Myrick*.

ARGUMENT

I. THIS COURT HAS JURISDICTION.

Plaintiff argues that the decision below was not "rendered by" the "highest court of [Florida] in which a decision could be had." Opp. at 1 (citing 28 U.S.C. § 1257(a)). Plaintiff is wrong.

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[1] We refer to the record, the parties and the statutes and regulations as in Hyundai's Petition. Phillip's Brief in Opposition is "Opp." We again refer to state common-law claims that would remove an FMVSS 208 option as "FMVSS 208" claims.

[2] That is, of course, incomplete. Congress did grant the option to install seatbelts instead of airbags. It also granted the option to install airbags instead of passive seatbelts, and to install passive two-point belts "in place of" passive belts that include a lap belt. 49 C.F.R. § 571.208, S4.1.2-S4.1.4, S4.5.3.

Plaintiff agrees that the District Court of Appeal did not certify that the preemption issue is a matter of "great public importance." Opp. at 2. Thus, the Florida Supreme Court had no jurisdiction to review the case on that ground, for "[c]ertification is a condition precedent to any review [by the Florida Supreme Court] on that ground." *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 596 (1961). *See* Fla. R. App. P. 9.030(2)(A)(v).

Plaintiff argues, however, that Hyundai should have asked the District Court of Appeal to certify the question after it had declined to do so itself. This Court has already rejected that argument. In *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967), the Court held that the District Court of Appeal was, in our setting, the court of last resort in Florida. Citing *Whitaker v. Jacksonville Expressway*, 131 So. 2d 22 (Fla. Dist. Ct. App.), *cert. denied*, 133 So. 2d 319 (Fla. 1961), this Court held that although "litigants may file a suggestion that a particular question be certified, such suggestion has been declared to have 'no legal effect.'" *Nash*, 389 U.S. at 237 n.1. Thus, the Court reasoned, "[I]t is impossible . . . to say that under Florida law petitioner had any right to call upon the State Supreme Court for review." *Id.*

That is this case. Hyundai could have asked the District Court of Appeal to certify the issue as a "matter of public importance," but the request would have no "legal effect" because, as *Whitaker* explains, the court always decides on its own whether a case should be certified:

> Inherent in every decision rendered by a District Court of Appeal is the implication, unless otherwise stated or contrary action taken, that it *does not* pass upon a question of great public interest. . . .

131 So. 2d at 23 (emphasis added). Thus, in Florida, a certification request is like a request for reconsideration of a matter already decided; requests for reconsideration are never a prerequisite for jurisdiction here. *Southern Ry. Co. v. Clift*, 260 U.S. 316, 318-19 (1922).

Plaintiff says *Nash* is no longer good law. When *Nash* was decided, she says, "the rules made no provision for a party to request certification," whereas now "Florida's appellate rules have been changed" and "specifically allow a party to ask the district court to certify an issue." Opp. at 4. Plaintiff is in error. *Whitaker* (the case *Nash* cites) held that "at any time prior to expiration of the time allowed for a petition for rehearing any interested party may file in a pending case a suggestion that the decision therein be certified." 131 So. 2d at 24. Thus, the procedures were the same then as now, and there is no basis to overrule *Nash*.[3]

Plaintiff argues that *Gotthilf v. Sills*, 375 U.S. 79 (1963), instead "controls." Opp. at 5. But *Gotthilf* was decided over dissent, and *Nash* was decided after *Gotthilf*. Moreover, nothing in *Gotthilf* suggests that in New York (the jurisdiction at issue), an intermediate appellate court's rejection of certification is "inherent in every decision," as it is in Florida.[4]

The Florida Supreme Court had no jurisdiction to review this case. This Court therefore has jurisdiction.

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[3] Indeed, when *Nash* was decided the Florida Supreme Court had broader jurisdiction than it has today. In March 1980, the Florida constitution was amended to expand the jurisdiction of the District Courts of Appeal, and restrict the jurisdiction of the Supreme Court, so that the District Court of Appeal would be the court of last resort in most cases. *See* Fla. Const., art. V, § 3(b).

[4] In any event, in *Myrick*, the Eleventh Circuit (which includes Florida) had already held that the Safety Act forecloses preemption claims with respect to any FMVSS. The District Court of Appeal thus followed the Eleventh Circuit decision. It would be difficult to argue, in good faith, that the preemption decision of the Florida court, which deferred to the Circuit in which it sat, presented a matter of great public importance **to Florida.** After all: (1) from Florida's perspective, the decision finding no preemption merely meant that Florida law applies in Florida; and (2) as to preemption, the Eleventh Circuit decision would stand whatever Florida courts did. The preemption issue does, however, present an issue of great public importance in this Court, for this Court has the power to (and will) review the Eleventh Circuit decision.

II. PLAINTIFF CANNOT CHANGE HER DEFECT THEORY, *POST HOC*, TO AVOID PREEMPTION.

Plaintiff concedes that FMVSS 208 granted manufacturers the right "to choose" among restraint system options, and that S4.5.3 of FMVSS 208 specifically granted the option to install a 2-point automatic belt system "in place of" a system with lap belts. 49 C.F.R. § 571.208, S4.1.2-S4.1.4, S4.5.3. Opp. at 18. She further does not dispute that NHTSA and the Secretary of Transportation judged that options, including the 2-point belt option, were the best way to meet the safety goal, and that mandating any single type of passive restraint "runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems." 49 Fed. Reg. at 29001 (1984).[5] Finally, she agrees that liability predicated "on a manufacturer's exercise of the very choice Congress granted would be improper." Opp. at 19. In fact, it is more than "improper;" it is unconstitutional, for state law that conflicts with federal law "is pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Rest. Emp. and Bartenders Int'l Union*, 468 U.S. 591, 501 (1984).

But, plaintiff protests, her claim did not seek to punish Hyundai's exercise of the 2-point belt option, instead of a system with a lap belt. Rather, plaintiff argues, she claimed only that Hyundai "defectively designed its two-point system." Opp. at 18. Thus, plaintiff proposes, the "no airbag" cases, and the *Myrick* decision that purports to supersede them, "do not apply here." Opp. at 19.[6]

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[5] *See also* Brief for the United States as Amicus Curiae Supporting Respondents, *Freightliner Corp. v. Myrick* (No. 94-286) (filed Dec. 13, 1994).

[6] Plaintiff also tries to distinguish the so-called "no airbag" cases by arguing that "[i]n the typical airbag case, the plaintiff was not wearing his seatbelt." Opp. at 19 n.11. "No airbag" claims are preempted because they take away the seat belt option; they do that whether plaintiffs used the belts or not. And, in fact, many "no airbag" plaintiffs wore their seat belts; their claims were still preempted. *See, e.g., Marrs v. Ford Motor Co.*, 852 S.W.2d 570, 572 (Tex. App.-Dallas 1993); *Surles v. Ford Motor Co.*, 709 F. Supp.

Plaintiff is playing with words. The first defect plaintiff identifies in the "two-point system" is "lack of adequate pelvic restraint." Opp. at 10-13, 15. "Pelvic restraint," of course, is a lap belt. Opp. at 7, 8-9, 10.[7] Indeed, the closing argument was devoted to the theory that the Hyundai's restraint system was defective because it did not have a lap belt; the other so-called theories—shoulder belt rigidity and web clamps—were never even mentioned. For example, plaintiff argued that the "knee bolster is no substitute for a lap belt" (R. Tr. 1506); that Hyundai should have told consumers that "if you want complete protection and not increase in injury you need a lap belt" (R. Tr. 1508); that the "industry standard" was to "put[] in a lap belt." (R. Tr. 1513-14) *See also* R. Tr. 1510, 1512, 1523, 1527, 1528. Even here, plaintiff argues that Hyundai "relied on the seat and padding on the lower dashboard to provide the lower body restraint *other systems and manufacturers provided with a lap belt.*" Opp. at 7 (emphasis added). And she complains that "restraint systems with a lap belt" were "safer than the shoulder-belt only system." Opp. at 13.

Thus, plaintiff's theory of defect was—and is—that the 2-point belt was defective because it was not a 3-point belt. That theory punishes the exercise of the 2-point belt option, takes that option away, accordingly conflicts directly with FMVSS 208, and so is preempted.[8]

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732 (N.D. Tex. 1988); *Baird v. General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio 1986). Quite a few cases also have found preempted the "no lap belt" claim plaintiff made here; since the 2-point belts were automatic, plaintiffs necessarily wore them. *See, e.g., Dykema v. Volkswagenwerk*, 1994 WL 621933 (Wis. App. Nov. 8, 1994); *Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. Ct. App. Div.), *cert. denied*, —— A.2d —— (N.J. Oct. 19, 1994).

[7] Hyundai does not, as plaintiff suggests, agree that it "design[ed] and install[ed] an *admittedly* defective" restraint system. Opp. at 18 (emphasis added). Hyundai has always believed and said that the 2-point system is safe. (*E.g.*, R. Tr. 1566-69) Moreover, NHTSA, charged with setting standards that "meet the need" for safety (15 U.S.C. § 1392(a)), endorsed that system repeatedly.

[8] *See, e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990) (citing *Fidelity Fed. Sav. & Loan*

Plaintiff's own authority, *Perry v. Mercedes Benz of N. Am., Inc.*, 957 F.2d 1257 (5th Cir. 1992), agrees. *Perry* concurred with "much of [the other circuits'] reasoning" on FMVSS 208 preemption, including "the conclusions of the other circuits that the Savings Clause does not preserve common law actions that would *actually conflict with*, or 'subvert,' the objectives and methods of the federal scheme." *Id.* at 1265 (original emphasis). *Perry* held that FMVSS 208 does not preempt a claim that challenges only the design of the FMVSS 208 option chosen, for such a claim does not require use of a different option. Hyundai has no quarrel with *Perry*. But plaintiff's claim is not a *Perry* claim. Plaintiff asked the jury to punish Hyundai for exercising an option that federal law determined was necessary to serve the safety goal, and the jury did so. This case fits squarely within the preemption findings of the FMVSS 208 case law, and the Court should review that Florida court's decision to follow *Myrick* instead of those cases.

III. FMVSS 208 IS THE ON-POINT FEDERAL STANDARD.

Plaintiff proposes that to preempt, a federal standard must relate to both the "aspect of performance" **and** the "item of equipment" as the state standard. Opp. at 25. Plaintiff argues that FMVSS 208 relates to restraint systems (the "item of equipment"), but not to abdominal restraint (the supposed "aspect of performance"). Thus, plaintiff concludes, there is no federal standard for her claim, which concerns abdominal injuries, to conflict with. Opp. at 25-26. That is, with respect, fanciful.

First, the Safety Act's preemption clause is disjunctive, not conjunctive. It preempts state standards not "identi-

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Ass'n v. de la Cuesta, 458 U.S. 141, 155 (1982)); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 787 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *Miranda*, 647 A.2d 167; *Boyle v. Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App.), *rev. denied*, 510 N.W.2d 137 (1993); *Marrs*, 852 S.W.2d 570.

cal" to a federal standard as to the "same aspect of performance . . . **or** item of equipment." 15 U.S.C. § 1392(d) (emphasis added). "Or" means "or;" "or" does not mean "and." No case reads the preemption clause as plaintiff does. *See, e.g. Jordan v. Paccar, Inc.*, 792 F. Supp. 545, 550 (N.D. Ohio 1992) (non-identical state regulation is preempted "when a federal standard deals specifically with **a particular item or category of equipment**") (emphasis added).

Second, even if the preemption clause were conjunctive, FMVSS 208 and plaintiff's claim relate to both the same "aspect of performance" and the same "item of equipment." The Safety Act mandates the issuance of regulations concerning "aspects of performance" and/or "items of equipment" of vehicles, not people. 15 U.S.C. § 1392(d). The "aspect of performance" at issue in FMVSS 208 is "occupant crash protection," without limitation as to kind of crash or injury. 49 C.F.R. § 571.208, S.2. The items of equipment are "active and passive restraint systems," also without limitation as to kind of crash or injury. *Id.* Likewise, plaintiff's claims relate to the design of the vehicle, not the plaintiff. Her claims addressed occupant restraint and seat belt restraint systems—exactly the "aspect of performance" and "item of equipment" that FMVSS 208 covers.[9]

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[9] Plaintiff cites *Pokorny*, 902 F.2d at 1126, and *Chrysler Corp. v. Tofany*, 419 F.2d 499 (2d Cir. 1969), but neither supports her. *Pokorny* concerned a car's performance in a rollover; FMVSS 208 does not set "performance standards" for rollover tests. Nonetheless, the court found that plaintiffs could not require a different FMVSS 208 option than the one chosen. The court did allow a claim that the car should have had window netting, because FMVSS 208 did not cover that item of equipment, and a window netting requirement would not take away any FMVSS 208 option. *Pokorny*, 902 F.2d at 1126.

Tofany concerned a state's effort to outlaw a "Super Lite," an optional light Chrysler offered to provide additional visibility of its vehicles. FMVSS 108 required certain lights (not including Super Lite), and prohibited additional lights that "impair[ed] the effec-

FMVSS 208 grants options among restraint systems because Congress and the Department of Transportation judged that options, and not a single restraint system design, best met the safety goal. FMVSS 208 claims would, as the United States recently put it, "interfer[e] with that federally protected freedom of choice," would "conflict[] with Standard 208," and so are preempted. Brief for the United States as Amicus Curiae Supporting Respondents at 28-29, *Freightliner Corp. v. Myrick*, (No. 94-286) (filed Dec. 13, 1994). The FMVSS 208 options are the same, and the effect of a design defect claim that takes away one of those options is the same, whatever the injury a plaintiff may have sustained in an accident. Indeed, it is odd, at the least, to propose that a person with an abdominal injury may take away an FMVSS 208 option, while a person with a chest injury may not.[10]

FMVSS 208 preempts any state law claim that takes away one of its restraint system options. The particular injuries claimed in the state law action do not change that.

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tiveness of the required equipment." 419 F.2d at 505. Apart from that prohibition, FMVSS 108 had no provision that related to the Super Lite. The circuit court held that the state regulation, which prohibited lights that might blind oncoming drivers, did not conflict with FMVSS 108. *Id.* at 510. In contrast, FMVSS 208 specifically relates to occupant restraint and addresses automatic seat belt design; indeed, it specifically endorses the option to install 2-point belts "in place of" 3-point belts—the option plaintiff took away.

[10] Indeed, plaintiff's theory is ultimately nonsensical. For plaintiff essentially proposes that only people who claim injuries at the measurement points for FMVSS 208's performance criteria—head, chest and femur—face preemption. Thus, under plaintiff's theory, a person who injured one leg bone (say, the tibia) could punish the exercise of an FMVSS 208 option, but a person who injured a different leg bone (the femur) could not. And what of people who suffered multiple injuries? Obviously, statutes and regulations are construed to make sense, not nonsense. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982).

IV. PLAINTIFF'S FAILURE TO WARN THEORY FALLS ON THE SAME GROUNDS AS HER DEFECT THEORY.

Plaintiff says her warning claim is an independent basis for denying review. Opp. at 29. Plaintiff is mistaken.

First, the Florida District Court of Appeal did not find that a failure to warn claim, or any state law ground, was an independent basis for upholding the verdict against a preemption challenge. *Hyundai Motor Company (Korea) v. Phillip*, 639 So. 2d 1064 (Fla. Dist. Ct. App. 1994) (App. A-2). This Court will exercise jurisdiction where the lower court's decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Coleman v. Thompson*, 501 U.S. 722, 733, *reh'g denied*, 501 U.S. 1277 (1991). That is this case.

Second, there is no basis in Florida law for any such alternative ground. The absence of a warning is not actionable in Florida unless, without it, a product is defective. *American Motors Corp. v. Ellis*, 403 So. 2d 459, 466 (Fla. Dist. Ct. App. 1981) ("The fallacy of the warning argument . . begs the question. If there were a defect in the [product] that caused the injuries . . . , AMC is liable, irrespective of any failure to warn; if there were not, there is no liability irrespective of any failure to warn."), *rev. denied*, 415 So. 2d 1359 (Fla. 1982). Thus, if the defect theory is not actionable, as a matter of Florida law, the warning claim is not either.

Finally, plaintiff avoids the warning claim she made. She argued that Hyundai should have advised Ann Marie Phillip that "for complete protection you have to have a lap belt." (R. Tr. 1512) That punished the exercise of the 2-point belt option, exactly as her defect claim did. Thus, it would also "interfer[e] with [the] federally protected freedom of choice," would "conflict[] with Standard 208," and so is preempted. United States Brief in *Myrick* at 28. Plaintiff cannot "circumvent" preemp-

tion "by relying on a duty to warn theory of liability." *Pak v. Chrysler Motor Corp.*, 1990 WL 198821 at *2 (E.D. Pa. 1990), *aff'd*, 941 F.2d 1200 (3d Cir. 1991). *Cf. Schick v. Chrysler Corp.*, 675 F. Supp. 1183, 1186 (D.S.D. 1987) (cannot avoid preemption by "theoretical sleight of hand").

In sum, the failure to warn claim is not, as a matter of fact or law, an independent state law ground for the Florida decision.

CONCLUSION

The Court should grant review. At the least, the Court should hold this petition until *Myrick* is decided, and then either grant review and consider the case, or grant review, vacate the lower court's decision, and remand the case for reconsideration in light of *Myrick*.

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